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TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1893.

No. 917.

THE NEW YORK AND NEW ENGLAND RAILROAD COMPANY, PLAINTIFF IN ERROR,

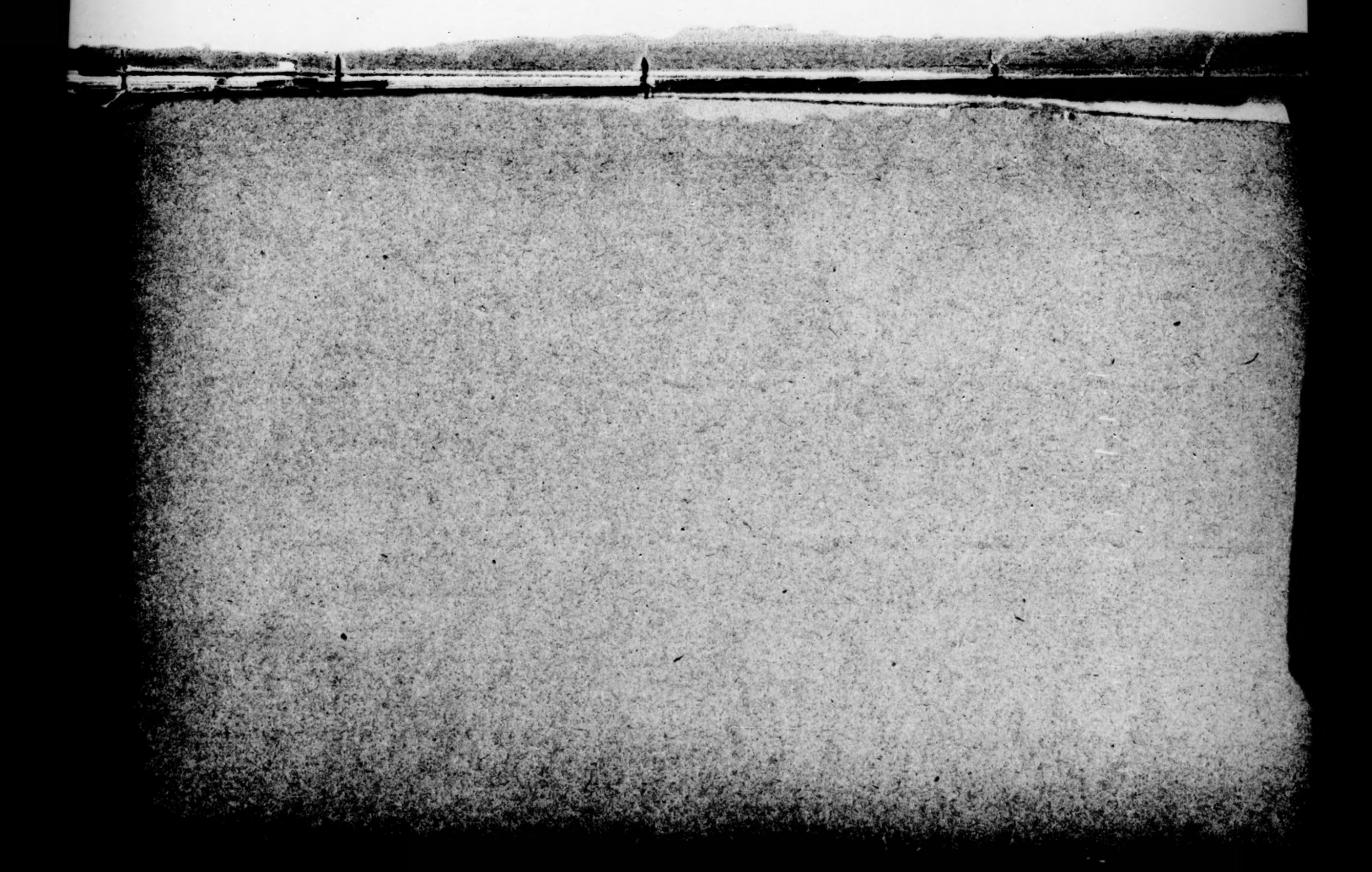
vs.

THE TOWN OF BRISTOL, HENRY W. GRIDLEY, ET AL.

IN ERROR TO THE SUPREME COURT OF ERRORS OF THE STATE OF CONNECTICUT.

FILED APRIL 12, 1893.

(15,294.)



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1 I, Charles W. Johnson, clerk of the supreme court of errors of the State of Connecticut and of the superior court in and for the county of Hartford, in the State of Connecticut, do hereby certify that the following are true copies of a certain writ of error directed to said supreme court of errors, filed in my office as clerk as aforesaid on the 10th day of March, 1893, and of the bond duly approved and filed therewith, and of the record of said case and of the opinion of the said supreme court of errors, filed in said case, and of all proceedings in the case in said courts, and also the original citation to the defendants in error in this appeal, with the officer's return of service duly endorsed thereon; and I further certify that on said 10th day of March, 1893, copies of said writ of error and said bond were also filed with me as said clerk for the defendants in error and by me transmitted to their attorneys of record.

In witness whereof I have hereunto set my hand and the seals of said courts respectively on this first day of April, 1893.

C. W. JOHNSON,
Clerk of the Supreme Court of Errors and of the Superior Court for the County of Hartford, in the State of Connecticut.

[Seal Superior Court, Hartford County, Ct.]

[Seal Supreme Court of Errors, Con.]

2 UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the honorable the judges of the supreme court of errors of the State of Connecticut, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said supreme court of errors, before you or some of you, being the highest court of law or equity of the said State in which a decision could be had in the said suit between The New York and New England Railroad Company, a corporation under the laws of said State and a citizen thereof, plaintiff, and The Town of Bristol, a municipal corporation of said State; Henry W. Gridley, Semantha Churchill, John B. Churchill, Augusta Churchill, Sarah C. Richards, A. H. Frinck, William Linstead, Henry A. Seymour, Rachel Nott, Charles E. Nott, Julius R. Mitchell, and Drusilla Mitchell, all of said town of Bristol; The Society of Trinity Church, The Bristol Savings Bank, and The Bristol National Bank, all corporations under the laws of said State, located in said town of Bristol; George M. Woodruff, of Litchfield, in said State; W. H. Hayward, of Colchester, in said State; William O. Seymour, of Ridgefield, in said State, as railroad commissioners of said State, all citizens of the State of Connecticut, defendants, wherein was drawn in question the validity of a statute of and an authority exercised under said State, on the ground of their being repugnant to the Constitution and laws of the United States, and the

decision was in favor of such their validity, and wherein was
3 drawn in question the construction of a clause of the Constitution and of certain statutes of the United States and the decision was against the title, right, privilege, or exemption specially set up or claimed under such clause of the said Constitution and said statutes, a manifest error happened, to the great damage of the New York and New England Railroad Company, as by its complaint appears, we, being willing that the error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you may have the same at Washington on the seventh day of April, A. D. 1893, in the said Supreme Court to be then and there held, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States, and the seal of the circuit court of the United States for the district of Connecticut, this 9th day of March, in the year of our Lord one thousand eight hundred and ninety-three.

[Seal of Circuit Court.]

E. E. MARVIN,
Clerk of the U. S. Circuit Court of the District of Connecticut.

Allowed by—

CHARLES B. ANDREWS,
Chief Justice of the Supreme Court of Errors of Connecticut.

4 Know all men by these presents that we, the New York and *New York and* New England Railroad Company, a corporation under the laws of the State of Connecticut, having a location and place of business at Hartford, in said State, as principal, and Edward D. Robbins, of Wethersfield, in said State, as surety, are held and firmly bound unto the Town of Bristol, Henry W. Gridley, Semantha Churchill, John B. Churchill, Augusta Churchill, Sarah C. Richards, A. H. Frinck, William Linstead, Henry A. Seymour, Rachel Nott, Charles E. Nott, Julius R. Mitchell, Drusilla Mitchell, the Society of Trinity Church, the Bristol savings bank, the Bristol National bank, George M. Woodruff, W. H. Hayward, and William O. Seymour, or their certain attorney, successors, administrators, or assigns; to which payment, well and truly to be made, we bind ourselves, our successors, heirs, and administrators, jointly and severally, by these presents.

Signed with our seals and dated this 9th day of March, one thousand eight hundred and ninety-three.

Whereas lately, at a term of the supreme court of errors of the State of Connecticut, in a suit pending in said court between The

New York and New England Railroad Company, as plaintiff, and The Town of Bristol, Henry W. Gridley, Semantha Churchill, John B. Churchill, Augusta Churchill, Sarah C. Richards, A. H. Frinck, William Linstead, Henry A. Seymour, Rachel Nott, Charles E. Nott, Julius R. Mitchell, Drusilla Mitchell, The Society of Trinity Church, The Bristol Savings Bank, The Bristol National Bank, George M. Woodruff, W. H. Hayward, and William O. Seymour, defendants, a judgment was rendered against said The New York and New England Railroad Company, and said The New York and New England Railroad Company having obtained a writ of error and filed a copy thereof in the clerk's office of the said court to reverse the judgment in the aforesaid suit, and a citation directed to the said Town of Bristol, Henry W. Gridley, Semantha Churchill, John B. Churchill, Augusta Churchill, Sarah C. Richards, A. H. Frinck, William Linstead, Henry A. Seymour, Rachel Nott, Charles E. Nott, Julius R. Mitchell, Drusilla Mitchell, The Society of Trinity Church, The Bristol Savings Bank, The Bristol National Bank, George M. Woodruff, W. H. Hayward, and William O. Seymour, railroad commissioners, citing and admonishing them to be and appear at a Supreme Court of the United States to be holden at Washington on the seventh day of April, A. D. 1893:

Now, the condition of this obligation is such that if the said The New York and New England Railroad Company shall prosecute the said writ of error to effect and answer all damages and costs if it fail to make its plea good, then the above obligation shall be void, or else to remain in full force and virtue.

[SEAL.] THE NEW YORK AND NEW ENGLAND RAILROAD COMPANY,
By EDWARD D. ROBBINS, *Its Attorney.*

[SEAL.] EDWARD D. ROBBINS.

Approved by—
CHARLES B. ANDREWS,
Chief Justice of the Supreme Court of Errors of the State of Connecticut.

The writ of error to operate as a supersedeas.

6 NEW YORK & NEW ENGLAND R. R. Co. }
vs.
TOWN OF BRISTOL *et al.* }

Superior Court, October Term, 1890.

To the superior court for the county of Hartford, to wit, to said court to be holden at Hartford in and for said county on the first Tuesday of May, 1891:

The petition and appeal of the New York & New England Railroad Company, a corporation under the laws of this State, respectfully shows that—

1. On the 2d day of March, 1891, the railroad commissioners of this State made an order to said company requiring the removal of

the grade crossing of its railroad and Main street in the town of Bristol, a full copy of which marked Exhibit A, is to be annexed hereto and filed herewith.

2. The New York & New England Railroad Company, in the year 1873, had a capital of twenty million dollars divided into 200,000 shares of $100 each. Said capital was invested in its railroad, equipment, and other plant.

3. Said company has never earned any dividend upon this stock, nor have the holders of said stock every received any dividend thereon.

4. Its railroad being then uncompleted, the General Assembly of the State of Connecticut, by law passed May 29, 1873, especially authorized said company to borrow money to the amount of ten million dollars, and to mortgage its railroad, property, and
7 franchises therefor, issuing bonds to the holders of said money, bearing interest at a rate not exceeding seven per cent. per annum.

5. In pursuance of said authority, said company borrowed said sum of ten million dollars, issuing its bonds therefor, and securing the same by a first mortgage upon its railroad, franchises, and property. Six million dollars of said bonds, by their terms, bear interest at the rate of seven per cent. per annum, and four million dollars at six per cent. per annum, such interest to be paid semi-annually. All of said bonds are still outstanding, and said company is still under the obligations thereof to the bondholders.

6. The General Assembly of the State of Connecticut, by law passed April 26, 1882, specially authorized said company to borrow an additional sum of five million dollars, issuing interest-bearing bonds therefor, and securing the same by a mortgage, subject to the prior incumbrances of its road, franchises, equipment, and property.

7. In order to enable it to complete its railroad, said company did borrow said sum of five million dollars, and did issue its bonds therefor, $4,002,000 of which bear interest according to their terms at the rate of six per cent. per annum, and $998,000 at the rate of five per cent. per annum, such interest to be paid semi-annually, and secured said bonds by a mortgage of its railroad, franchises, equipment, and property. All of said bonds are now outstanding, and said company is still under the obligations thereof to their holders.

8. The General Assembly of this State, by law passed March 25, 1884, authorized said railroad company to issue not exceeding fifty thousand shares of preferred stock of the par value of one hundred dollars each, and enacted that the holders of the said stock should be entitled to receive dividends of seven per cent. per annum, which should also be cumulative, and if not paid in any year, payable out of the net earnings of any subsequent year.

9. In order to enable it to lay a double track, which was necessary for the safe management of its business, said company issued
8 $2,700,000 of said preferred stock, on which it must now and hereafter pay seven per cent. per annum as aforesaid.

10. In the year 1889, said company had a deficit of $636,863.15, and in 1890 of $436,612.71.

11. Said company cannot meet the expenses of executing the said order of the railroad commissioners, and have enough income left to pay its fixed charges including interest on its bonds issued as aforesaid and outstanding, and the dividends on its preferred stock issued as aforesaid, and maintain its railroad in good and proper condition.

12. If the law under which the proceedings were had, as set forth in said order, justifies said order, then it and said law are void as violating both the Constitution of the United States and the constitution of the State of Connecticut, in that said order impairs the obligation of the contracts made by said company with the holders of its bonds and preferred stock by making it impossible for said company to pay the interest on their bonds and dividends on their preferred stock as agreed between them and said company, and yet maintain and operate its railroad efficiently, and further in that it takes the property of said company without just compensation and without due process of law, and denies to it the equal protection of the laws.

Said company is aggrieved by said order and appeals therefrom to this court.

The plaintiff claims that the court proceed hereon in the same manner as on complaints for equitable relief, according to the statute in such case made and provided, and that said order be reversed and set aside.

THE N. Y. & N. E. R. R. Co.,
By EDWARD D. ROBBINS,
Its Attorney.

To the sheriff of the county of Hartford or his deputy, Greeting:

You are hereby commanded to summon the Town of Bristol, Henry W. Gridley, Semantha Churchill, John B. Churchill,
9 Augusta Churchill, Sarah C. Richards, A. H. Frinck, William Linstead, Henry A. Seymour, Rachel Nott, Charles E. Nott, Julius R. Mitchell, and Drusilla Mitchell, all of the town of Bristol in the State of Connecticut, the Society of Trinity Church, the Bristol savings bank, and the Bristol National bank, all corporations located in said town of Bristol, George M. Woodruff of Litchfield, W. H. Hayward of Colchester, and William O. Seymour of Ridgefield, railroad commissioners as aforesaid, to appear before the superior court to be holden in and for the county of Hartford on the first Tuesday of May, 1891, then and there to answer unto the New York & New England Railroad Company upon the foregoing petition and appeal.

Hereof fail not, but make service in accordance with law of the foregoing petition and appeal and of this order, and make due return hereof.

Dated at Hartford, Connecticut, this 20th day of March, 1891.

EDWARD D. ROBBINS,
Justice of the Peace.

HARTFORD COUNTY, *ss:*

BRISTOL, *March* 20, *A. D.* 1891.

On said day I left a true and attested copy of the within, with Rachel Nott in said town of Bristol, and the same day a like copy with William O. Seymour of Ridgefield, and on the 21st day of March, A. D. 1891, left like copies with the other defendants in their respective towns.

Attest: A. P. MOORE,
Deputy Sheriff.

Fees.

19 copies	$38 00
20 endorsements	2 40
19 services	2 38
Travel to serve and return, 390 miles	39 00
	$81 78

10 THE NEW YORK & NEW ENGLAND RAILROAD COMPANY *vs.* THE TOWN OF BRISTOL *et al.* } Superior Court, Hartford County, May 11, 1891.

Amendment to Petition of Appeal.

The appellant hereby amends its petition of appeal by adding the following:

15. And for further specifications of its grievances the appellant says that during the year ending August 1, 1890, it was engaged at great expense in the removal of the grade crossing at Asylum street, and of the main grade crossing at Church street, in Hartford, by elevating its tracks above said streets, and arranging for an elevated passenger depot at Hartford, in consequence thereof, at a very large expense.

16. Said order, herein appealed from, was not an order necessary for the safety of the public, nor of public convenience and necessity; but, if executed, would be highly inconvenient and injurious to the public, the owners of land adjoining the work, and the appellant, and would entail an expense out of all proportion to the benefit secured, to wit, an expense of one hundred thousand dollars.

17. Said order should have been so made, and proceedings leading up thereto had, if at all, under section 2 of the act of 1889, as that one-quarter of the expense of its execution should be paid by the State.

By EDWARD D. ROBBINS,
Its Attorney.

EXHIBIT "A."

STATE OF CONNECTICUT,
OFFICE OF THE RAILROAD COMMISSIONERS,
HARTFORD, *March* 2, 1891.

Be it remembered that on the 2d day of September, 1890, the following order for hearing and of notice was by us made in regard

to the removal of the grade crossing of the New York & New England railroad and the highway known as Main street, in the town of Bristol, viz:

11 "STATE OF CONNECTICUT,
OFFICE OF THE RAILROAD COMMISSIONERS,
HARTFORD, *September* 2, 1890.

Whereas the directors of the New York & New England Railroad Company failed to remove or apply for the removal during the year ending August 1, 1890, of any grade crossing of a highway which crossed or was crossed by their railroad; and

Whereas in our opinion said directors should have applied for the removal of the grade crossing of their road and the highway known as Main street in the town of Bristol, therefore be it

Ordered, that a hearing be had at the passenger station of said company in said Bristol on Wednesday the 24th day of September, 1890, at 9 o'clock a. m., as to what alterations, changes, or removals, if any, shall be made at said crossing and by whom done, and that notice thereof be given to the selectmen of said town, to said company, and to the owners of the land adjoining said crossing and adjoining that portion of said highway to be changed in grade, by Geo. T. Utley, by depositing in the post office in Hartford, postage paid, true and attested copies of this order on or before the 6th day of September, instant, addressed one to each of the following-named parties, viz: The selectmen, Bristol, Conn., James W. Perkins, secretary N. Y. & N. E. R. R. Co., Boston, Mass., Henry W. Gridley, the Bristol National bank, Samantha Churchill, John B. Churchill, Augusta Churchill, the Society of Trinity Church, the Bristol savings bank, C. H. Riggs, F. H. Williams, Sarah C. Richards, A. H. Frinck, William Linstead, Henry A. Seymour, Rachael Nott, Charles E. Nott, Julius R. Mitchell, and Drusilla Mitchell, all of Bristol, Conn.

GEO. M. WOODRUFF,
W. H. HAYWARD,
WM. O. SEYMOUR,
Railroad Commissioners."

12 And on said 24th day of September we met at the time and place named in said order when it appeared and we do find that said order of notice had been duly complied with and that reasonable notice of said hearing had been given to said railroad company, to the municipality in which said crossing is situated, and to the owners of the land adjoining such crossing, and adjoining that part of the highway to be changed in grade; and all of said parties appeared and were heard in part and the further hearing was by agreement adjourned until the 25th of November, 1891, at the town hall in said Bristol, where said parties again appeared and were heard. And the further hearing on said matter was from time to time adjourned until the 11th day of February, instant at this office at 2 o'clock p. m., and on the 3d day of February, instant, a further order of notice was by us issue l as follows, viz:

"'STATE OF CONNECTICUT,
OFFICE OF THE RAILROAD COMMISSIONERS,
HARTFORD, *February* 3, 1891.

Whereas the undersigned railroad commissioners of Connecticut on the 2d day of September, 1890, issued their order as follows, viz:

'STATE OF CONNECTICUT,
OFFICE OF THE RAILROAD COMMISSIONERS,
HARTFORD, *September* 2, 1890.

Whereas the directors of the New York & New England Railroad Company failed to remove or apply for the removal during the year ending August 1, 1890, of any grade crossing of a highway which crossed or was crossed by their railroad, and

Whereas in our opinion said directors should have applied for the removal of the grade crossing of their road and the highway known as Main street, in the town of Bristol, therefore it is

Ordered, that a hearing be had at the passenger station of said company in said Bristol on Wednesday, the 24th day of Sep-
13 tember, 1890, at 9 o'clock a. m., as to what alterations, changes, or removals, if any, shall be made at said crossing and by whom done, and that notice thereof be given to the selectmen of said town, to said company, and to the owners of the land adjoining said crossing and adjoining that portion of said highway to be changed in grade, by Geo. T. Utley by depositing in the post office in Hartford, postage paid, true and attested copies of this order on or before the 6th day of September, instant, addressed one to each of the following-named parties, viz: The selectmen, Bristol, Conn., James W. Perkins, secretary N. Y., N. H. & H. R. R. Co., Boston, Mass., Henry W. Gridley, the Bristol National bank, Semantha Churchill, John B. Churchill, Augusta Churchill, the Society of Trinity Church, the Bristol savings bank, C. H. Riggs, F. H. Williams, Sarah C. Richards, A. H. Frinck, William Linstead, Henry A. Seymour, Rachael Nott, Julius R. Mitchell, and Drusilla Mitchell.

GEO. M. WOODRUFF,
W. H. HAYWARD,
WM. O. SEYMOUR,
Railroad Commissioners.'

And the hearing in said matter having been adjourned from time to time till the 11th day of February, 1891, at 2 o'clock p. m., at our office in Hartford, therefore

Ordered, that notice of said adjourned hearing be given by Geo. T. Utley by depositing in the post office at Hartford, true and attested copies of said original order and of this order addressed to each of the parties named in said order of September 2, 1890, on or before the 5th day of February, instant.

GEO. M. WOODRUFF,
W. H. HAYWARD,
WM. O. SEYMOUR,
Railroad Commissioners."

And pursuant to said adjournment and notice we met at said last-named time and place, when said parties again appeared and were fully and finally heard.

And now after such notices and hearings we being of
14 opinion that the financial condition of the said New York & New England Railroad Company will warrant such order and that public safety requires the same, do hereby order such crossing removed, and do determine and order that the following alterations, changes, and removals be made and done, to wit: That the method of crossing be altered so that said highway instead of crossing said tracks at grade as at present be carried under said tracks, and for that purpose that the location of the said crossing be changed by the removal of said tracks from their present location to a point about eighty feet southerly therefrom, the same being carried over said highway on a double-track iron bridge with not less than 12 feet clear head room, with stone abutments located upon the street lines upon each side and with supporting columns upon the gutter lines of the street; said street being excavated so much as may be necessary to give said head room with approaches not exceeding nine feet in a hundred on the north side of said crossing and level upon the south side, and not exceeding five feet in a hundred on North Main street, and four feet in a hundred on Prospect street; said alterations and changes being also delineated and shown on two maps on file in this office, one marked "N. Y. & N. E. R. R. Proposed under crossing of Main street, Bristol, Conn., scale 50 feet to one inch, chief engineer's office, Boston, February 10, 1891, L. B. Bidwell, chief engineer," and the other marked "Proposed change of Main-street crossing, Bristol, Conn., scale 40 feet to one inch, Boston, February 10, 1891, L. B. Bidwell, chief engineer." All of said alterations, changes, and removals to be made and done by said railroad company and the expense thereof, including the damages to any person whose land is taken, and the special damages which the owner of any land adjoining the public highways shall sustain by reason of any change in the grade of such highways in consequence of any change, alteration, or removal above ordered, to be paid by said railroad company.

GEO. M. WOODRUFF,
W. H. HAYWARD,
WM. O. SEYMOUR,
Railroad Commissioners.

15 NEW YORK & NEW ENGLAND R. R. Co. } Superior Court,
vs. } Hartford County,
TOWN OF BRISTOL *et al.* } May, 1891.

Demurrer.

The defendants, George M. Woodruff, W. H. Hayward, and Wm. O. Seymour, railroad commissioners of the State of Connecticut, demur to the plaintiff's petition and say that it is insufficient in the law, and that the order appealed from ought to be confirmed for the following reasons:

I.

1. It appears from the petition, and the plaintiff does not deny, that the directors of the plaintiff company were in default, in that they had failed, during the year ending August 1, 1890, to remove, or to apply for the removal, of any grade crossing of a highway which crossed or was crossed by their railroads.

2. It appears from the petition, and the plaintiff does not deny, that the grade crossing in question is one which the said directors should have applied for the removal of.

3. The petition, therefore, should be dismissed, and the order of the railroad commissioners affirmed.

(*a*) Because it appears on the face of the petition that the action and order of the commissioners were strictly in obedience to, and in compliance with, the plain provisions of the statute law of the State of Connecticut.

(*b*) Because it appears from the facts set up that the appellant company was clearly acting in disobedience to, and non-compliance with, the statute law of the State of Connecticut.

(*c*) Because all questions concerning the financial condition of the appellant company as affecting its ability to make such change in compliance with said order, are left to the discretion of the railroad commissioners.

(*d*) Because no facts are set up which tend to show that
16 either said order or the statute under and by authority of which it was issued, violate either the Constitution of the United States or the constitution of the State of Connecticut.

(*e*) Because said petition sets up no facts constituting proper ground of reversal, but is merely an argument for reversal and is therefore improper in form.

II.

Because said petition sets up no facts and assigns no reasons which tend to show that said statute and said order are unconstitutional. But said statute and said order are constitutional, notwithstanding such facts and reasons as are set forth in said petition.

1. Because said order and statute relate wholly to the matter of abolishing grade crossings, *i. e.*, the crossing of highways by railroads at grade.

2. Such grade crossings are nuisances, dangerous to life, and the particular one in question is one of the most dangerous on the petitioner's road.

3. It is the policy of this State to abolish such crossings, and it is a matter wholly within the police power of the State to be exercised by the legislature directly by general law, by special act, or by and through a commission thus authorized to act for the State.

4. This is a power which cannot be exercised by the United States so far as cause in question is concerned.

5. This order, under the statute, is not a taking of the property of the petitioner, but a regulation of the use of its property under the law.

6. The petitioner is a person in law, existing and enjoying its rights and privileges only by special permission and license of the State. Its first duty is to the State, and the matter of its obligations to others, voluntarily assumed, cannot be brought forward to affect its duty to obey the law of its creator, especially where that law only concerns the abatement of a nuisance and the exercise of said police power.

17 III.

The said defendants especially demur to paragraph 12 of the petition.

1. Because no facts are set up and no reasons are alleged which tend to show that said statute and said order, or either of them, violate either the Constitution of the United States or the constitution of the State of Connecticut.

2. Because said paragraph is an argument, and not a statement of fact.

3. For the reasons given in section II.

IV.

The said defendants specially demur to the 11th paragraph of said petition.

1. Because it is insufficient in law.

2. Because all questions raised in said paragraph against the execution of said order are left to the discretion of the railroad commissioners.

3. Because said paragraph is an argument, and not a statement of fact.

Defendants GEORGE M. WOODRUFF,
W. H. HAYWARD,
WM. O. SEYMOUR,
Railroad Commissioners,
By JOHN J. JENNINGS,
Their Attorney.

NEW YORK & NEW ENGLAND R. R. Co. *vs.* TOWN OF BRISTOL *et al.* } Superior Court, Hartford County, May, 1891.

Amendment to Demurrer to Petition of Appeal.

The petitioner having added paragraphs 15, 16, 17, to its petition of appeal, the defendants amend their demurrer as follows:

18 The demurrer as heretofore filed is hereby made to apply with full force and effect to the amended petition of appeal.

V.

1. The defendants specially demur to paragraph 15 because it is insufficient in law and entirely irrelevant and immaterial and for the reasons set forth in section II.

VI.

The defendants specially demur to paragraph 16.

1. Because it is insufficient in law.

2. Because the facts and reasoning set forth in said paragraph are facts and reasoning to be addressed to the discretion of the commissioners and exhaust themselves there.

3. Because the facts and reasons therein set forth are not facts and reasons within the purview of said statute, and are immaterial and irrelevant.

VII.

The defendants demur specially to paragraph 17 because it is insufficient in the law, and is the statement of a conclusion of law and not of any fact.

VIII.

The defendants further demur to said amended petition of appeal and protest that they ought not to be required to answer the same, and that the same should be dismissed.

1. Because the same is multifarious and uncertain in that in the same count are joined statements of fact, arguments addressed to the discretion of the commissioners, arguments as to the constitutionality of the statute in question and conclusions of law.

2. Because there are set forth in said amended appeal, in one count at least, three distinct causes of appeal:

(*a.*) Financial inability of the company to obey the order.

19 (*b.*) Unconstitutionality of the order and statute in question.

(*c.*) That the proceedings were brought improperly and under a statute not authorizing the same.

4. Because for these reasons said petition is insufficient in the law, and violates the rules of practice governing proceedings in the courts of this State.

DEFENDANTS,
By JOHN J. JENNINGS,
Their Attorney.

THE NEW YORK & NEW ENGLAND RAILROAD COMPANY
vs.
THE TOWN OF BRISTOL *et al.*

Hartford County Superior Court, March Session, A. D. 1891.

Memorandum on Demurrer.

The demurrer filed to the petition for appeal raises questions which, under the peculiar nature of this proceeding, I think should be considered by the court upon a motion to strike out as irrelevant and immaterial rather than on a demurrer.

The right of appeal, I think, is clearly given by the statute to the railroad company.

When it files its reasons for appeal the parties in interest can, by motion to strike out, obtain a ruling as to the real questions perti-

nent to the issue, to be tried in the superior court, or if no reasons are ordered, a motion to strike out such matters from the existing petition as are covered in the several points made in the demurrer will accomplish the same purpose.

For the foregoing reasons I overrule the demurrer.

J. M. HALL, *Judge.*

20 THE NEW YORK & NEW ENGLAND RAILROAD COMPANY *vs.* THE TOWN OF BRISTOL *et al.* } Superior Court, Hartford County, May, 1891.

Cross-complaint of Henry A. Seymour.

The defendant, Henry A. Seymour, brings this cross-complaint against his codefendants, Geo. M. Woodruff, W. H. Hayward, and William O. Seymour, railroad commissioners, The Town of Bristol, and The New York & New England Railroad Company, and says:

1. The order appealed from in the original petition of appeal in this action inflicts great, irreparable, and unnecessary damage on this defendant, and practically destroys his premises thereby affected.

2. There is no necessity for such destruction or damage to his said property.

3. Such destruction and damage might and should be avoided by a slight change of the line of said proposed alterations.

4. If it cannot be so avoided, then said order should be wholly set aside and annulled.

This defendant claims that the court proceed hereon, as in other cases for equitable relief, and modify or reverse and set aside said order.

By NOBLE E. PIERCE,
His Attorney.

THE NEW YORK & NEW ENGLAND RAILROAD COMPANY *vs.* THE TOWN OF BRISTOL *et al.* } Superior Court, Hartford County, May, 1891.

Answer of Henry A. Seymour.

1. Paragraphs 1, 13, and 16 of the amended petition of appeal are admitted.

21 2. As to paragraphs 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, and 15, this defendant has no knowledge or information sufficient to form a belief.

3. It is admitted that said order ought to be set aside.

HENRY A. SEYMOUR,
By NOBLE E. PIERCE,
His Attorney.

THE NEW YORK & NEW ENGLAND RAILROAD COMPANY
vs.
THE TOWN OF BRISTOL *et al.*
} Superior Court, Hartford County, May 29, 1891.

Plea in Abatement to Cross-complaint of Henry A. Seymour.

The defendants, George M. Woodruff, William H. Hayward, and William O. Seymour, railroad commissioners, plead in abatement to the cross-complaint of Henry A. Seymour, because—

1. The order of the railroad commissioners in the matter in question was communicated to the said complainant, said Henry A. Seymour, on or about the 21st day of February, 1891.

2. Said cross-complaint was filed in court on the 28th day of May, 1891.

3. Said cross-complaint or appeal was not otherwise served upon any party in interest than in the manner stated in paragraph 2.

4. Said Seymour did not take his appeal from said order within thirty days after the publication of said order by a petition in writing with a proper citation signed by some competent authority, to all parties having an interest adverse to him, and served upon them twelve days before its return day as required by law, but only as is heretofore set forth.

And therefore the said defendants pray judgment.

Defendents GEORGE M. WOODRUFF ET AL.,
Railroad Commissioners,
By JOHN J. JENNINGS, *Their Attorney.*

22 Plea in abatement sustained and complaint dismissed.
J. M. HALL, *Judge.*

THE NEW YORK & NEW ENGLAND RAILROAD COMPANY
vs.
THE TOWN OF BRISTOL *et al.*
} Superior Court, Hartford County, May 29, 1891.

Demurrer to plea in abatement to cross-complaint of Henry A. Seymour by the defendants George M. Woodruff, Wm. H. Hayward, and Wm. O. Seymour, railroad commissioners.

The defendant, Henry A. Seymour, who filed the cross-complaint in this action, hereby demurs to the plea in abatement of the parties above named, because

1. Such plea in abatement does not set forth any lawful ground for abatement or dismissal of such cross-complaint. It was not necessary that such cross-complaint should be otherwise served than as set forth in said plea of abatement it was served, and it was not necessary that said Seymour should take an appeal from said order, the appeal having been already taken by the New York & New England Railroad Company, which appeal under the statute transfers the cause to this court and reopens it for the full hearing of all parties in interest, and for such modification or affirmance as may seem to this court proper.

2. Because the said defendants, George M. Woodruff, Wm. H. Hayward, and Wm. O. Seymour, railroad commissioners, are not properly parties to this action, and have no interest in the proceedings or in the result thereof, and ought not to be allowed to plead as against the other parties, and particularly as against this defendant, Henry A. Seymour, who is properly a party to this action and interested in the result thereof.

Defendant HENRY A. SEYMOUR,
By His Attorneys.

Demurrer overruled.

J. M. HALL, *Judge.*

23 NEW YORK & NEW ENGLAND R. R. Co. *vs.* TOWN OF BRISTOL *et al.* } Superior Court, Hartford County, May 29, 1891.

Motion to Strike Out Certain of the Defendants from the List of Parties to the Action.

The defendant, Henry A. Seymour, hereby moves the court that the names of the defendants, George M. Woodruff, Wm. H. Hayward, and Wm. O. Seymour, railroad commissioners, be stricken from the list of parties defendant to said action, for the reason that as appears from the record, said persons are only summoned in their official capacity as railroad commissioners, and because said railroad commissioners have no interest in the subject-matter of the proceedings, and because their only connection with said action is that as a subordinate tribunal, subordinate to this court, they made the order from which this appeal is brought and ought not to appear in this, the appellant tribunal, to interfere, and to be heard relative to the further proceedings in the action before this court.

Defendant HENRY A. SEYMOUR,
By PIERCE & WINSLOW,
His Attorneys.

Motion denied.

J. M. HALL, *Judge.*

NEW YORK & NEW ENGLAND R. R. Co. *vs.* TOWN OF BRISTOL *et al.* } Superior Court, Hartford County, September, 1891.

Motion to Strike Out.

I.

1. The defendants, George M. Woodruff, W. H. Hayward, and William O. Seymour, move to strike out of the petition of appeal the following matter for the reasons assigned:

24 A.

The defendants move to strike out sections 2 to 10 inclusive because,

1. The same is redundant, immaterial, and irrelevant, and do not state material facts which affect the remedy.

2. Because the same constitute facts which can only be applied to determine the discretion of the railroad commissioners as to the inception of proceedings, leading up to the order complained of.

3. Because the same can relate only to the opinion of the railroad commissioners as to the financial condition of the petitioner, a matter which rests only in the discretion of the railroad commissioners, and because said opinion is not a decision of the railroad commissioners, from which an appeal can be taken.

B.

1. The defendants also move to strike out paragraph 11 of the petition for the reasons given in A and for the further reason that said paragraph is the statement of an argument and not the statement of a fact.

C.

1. The defendants also move to strike out paragraph 15 of the amended petition for the reasons given in A, and for the further reason that the same is utterly irrelevant in that it does not set up any facts which concern the performance of the duty imposed upon the petitioner by the statute affecting this case.

D.

The defendants also move to strike out of paragraph 16 of the petition the words, "was not an order necessary for the safety of the public, nor of public convenience and necessity."

1. Because the same relates to matters not within the purview of the statute and because the same is redundant, immaterial, and irrelevant.

25 2. Because the same can relate only to whether the grade crossing affected is one of those for the removal of which the directors of the petitioner should have applied, and that is a matter resting in the opinion of the railroad commissioners, and not appealable.

E.

The defendants also move to strike out of said paragraph 16 the words "but, if executed" to the end of the paragraph for the reasons given in D.

II.

The defendants move that the petitioners be required to separate paragraphs 12 and 17 from the rest of the petition into separate counts. Because each of said paragraphs contains a statement of law, which, if good, would support without evidence a decree reversing said order.

The defendants submit that the petition should be drawn in such shape that the defendants may demur separately to these paragraphs

and thus secure judicial decision as to the propriety of said statements of law.

III.

If said separation into counts as prayed for in section II be not enforced, the defendants move to strike out said paragraphs 12 and 17 because the same are redundant, immaterial, and irrelevant, and because the same constitute the statement of conclusions of law only.

Defendants GEORGE M. WOODRUFF,
W. H. HAYWARD,
WM. O. SEYMOUR,
By Their Attorney.

26 NEW YORK & NEW ENGLAND R. R. Co. *vs.* TOWN OF BRISTOL *et al.* } Superior Court, Hartford County, Oct. Session, 1891.

Motion to strike out, filed October 6, 1891.

Memorandum of Decision.

Upon this motion the court orders to be stricken out of paragraph 16 of the petition of appeal, all after and including the word "nor" in the second line thereof.

And also orders to be stricken out of said petition and appeals the whole of paragraph 15, unless it is in good faith claimed, and so amended as to allege that one removal of a grade crossing for every 60 miles of the company's line in this State was made or applied for by the company's directors within a year as required by section 1 of the act of 1889.

As to paragraphs 2 to 10 inclusive, the court is inclined to think that these are statements of evidence, and therefore should have no place in the petition, and the court strikes them out; but with leave to amend if the defendants desire to do so by setting up the simple fact that the company is not of sufficient ability to execute the work of making the proposed changes.

The court declines to strike out paragraphs 11, 12, and 17, and also declines to order the two latter paragraphs into separate counts.

ROBINSON, *Judge.*

On this Dec. 18, 1891, the plaintiff duly excepted to such of the rulings of the court set forth in the first three paragraphs of the above memorandum of decision by order of court.

FRANCIS CHAMBERS, *Ass't Clerk.*

27 NEW YORK & NEW ENGLAND R. R. Co. *vs.* TOWN OF BRISTOL *et al.* } Superior Court, Hartford County, March 18, 1892.

Amendment of Petition.

The plaintiff amends its petition and appeal by inserting the following:

1*a*. Said company is not, and at the date of said order was not of sufficient ability to execute the work of making the changes required by said order, and its financial condition does not and did not then warrant the making of such an order.

THE NEW YORK & NEW ENGLAND R. R. CO.,
By SIMEON E. BALDWIN,
EDWARD D. ROBBINS, *Its Attorneys.*

NEW YORK AND NEW ENGLAND RAILROAD COMPANY *vs.* TOWN OF BRISTOL *et al.* } Superior Court, Hartford County, December, 1891.

Answer of respondents George M. Woodruff, William H. Hayward, and William O. Seymour, railroad commissioners, to the petition.

1. Paragraph 1 is admitted.
2. All the other allegations of the complaint and petition are denied.

Respondents GEORGE M. WOODRUFF,
WILLIAM H. HAYWARD,
WILLIAM O. SEYMOUR,
By NEWELL & JENNINGS,
Their Attorneys.

28 NEW YORK & NEW ENGLAND RAILROAD COMPANY *vs.* TOWN OF BRISTOL and Others. }

Memorandum of Decision.

I find in the above-named case, that the financial condition of the plaintiff railroad company will warrant the order of the railroad commissioners for the removal of the grade crossing in question, that said crossing is among the most dangerous ones upon the line of said railroad, and that the safety of the public requires its removal.

The order of the railroad commissioners is affirmed.

F. B. HALL, *J.*

July 21, 1892 (as of last day of April session).

THE NEW YORK & NEW ENGLAND RAILROAD COMPANY
vs.
TOWN OF BRISTOL, HENRY W. GRIDLEY, Samantha Churchill, John B. Churchill, Augusta Churchill, Sarah C. Richards, A. H. Funck, William Linstead, Henry A. Seymour, Rachel Nott, Chas. E. Nott, Julius R. Mitchell, and Drusilla Mitchell, all of the Town of Bristol, and The Society of Trinity Church, Bristol Savings Bank, and The Bristol National Bank, all Corporations Located in said Town of Bristol; George M. Woodruff, of Litchfield; W. H. Hayward, of Colchester, and William O. Seymour, of Ridgefield, Railroad Commissioners of the State of Connecticut.

Superior Court, Hartford County, July 29, 1892.

29 This action, by petition appealing from the order of the railroad commissioners, dated the 2d day of March, 1891, requiring the removal of the grade crossing of the plaintiff's railroad and Main street in the town of Bristol, as on file, came to this court on the first Tuesday of May, 1891, and thence by continuance to the present term, when the plaintiff and the defendants, Railroad Commissioners George M. Woodruff, W. H. Hayward, and William O. Seymour, and defendant Henry A. Seymour, appeared and were at issue to the court as on file.

And the court having heard the parties, finds that the financial condition of the plaintiff railroad company will warrant the order of the railroad commissioners for the removal of the grade crossing in question, that said crossing is among the most dangerous ones upon the line of said railroad, and that the safety of the public requires its removal.

Whereupon it is ordered and adjudged that the order of the railroad commissioners appealed from in this action be and the same is hereby affirmed.

And it is further ordered that The New York & New England Railroad Company, the plaintiff, pay to the railroad commissioners, the defendants, their costs, taxed at — dollars and — cents.

By the court:

C. W. JOHNSON, *Clerk.*

THE NEW YORK & NEW ENGLAND RAILROAD COMPANY
vs.
TOWN OF BRISTOL.

Superior Court, Hartford County, July 28, 1892.

Notice of Appeal.

In the above-entitled cause the plaintiff hereby files notice of an appeal from the judgment of the court therein to the next

30 term of the supreme court of errors for the first judicial district to be holden at Hartford on the first Tuesday of October, 1892.

THE NEW YORK & NEW ENGLAND R. R. CO.,
By EDWARD D. ROBBINS, *Its Attorney.*

THE NEW YORK & NEW ENGLAND RAILROAD COMPANY *vs.* TOWN OF BRISTOL *et al.* } Superior Court, Hartford County, October Term, 1891.

Finding of Facts.

Upon the trial of the above-named cause to the court upon the pleadings as on file the following facts were found:

Said railroad company is and at the date of said order was of sufficient ability to execute said order of the railroad commissioners, and the financial condition of said company was at the time of the making of said order, and is such, as to warrant the order for the removal of said crossing.

Said crossing so ordered to be removed is one of the most dangerous ones upon the line of said railroad, and said order was necessary for the safety of the public.

At the commencement of the trial the plaintiff moved to strike out the answer of the railroad commissioners upon the ground that they were not entitled under the statute to appear and plead and defend in said proceedings in this court. The court denied the motion and the plaintiff excepted to said ruling.

Plaintiff offered to prove that in December, 1890, the railroad commissioners, in a proceeding against the New York, New Haven & Hartford Railroad Company, ordered the removal of a grade crossing of Morgan street in the city of Hartford, in such manner as to require one-fourth the expense of such removal to be paid by the State.

Said evidence was offered in support of the allegations of paragraph 17 of plaintiff's petition.

31 Upon the objection of the defendant the court excluded said evidence and the plaintiff excepted to said ruling.

F. B. HALL, *Judge.*

NEW YORK & NEW ENGLAND RAILROAD COMPANY *vs.* TOWN OF BRISTOL. }

Amendment to Finding.

The plaintiff having, for the purpose of proving that the financial condition of the plaintiff railroad company was not such as to warrant the making of the order in question, offered witnesses who testified regarding the earnings, expenses, and property of the company. Counsel for defendant, upon cross-examination of one of said witnesses, asked the following questions:

Q. Mr. Dudley, you have a traffic arrangement with the New England Terminal Company, have you not?

A. Yes, sir.

Q. What are the terms of that contract?

Counsel for plaintiff objected to this inquiry.

Mr. BALDWIN: "I have a copy of that contract if it is material. We object simply because we think it is irrelevant. If your honor thinks it ought to come in, here it is."

The COURT: Without stopping now to examine the question of its materiality, I am inclined to receive it.

Copy of the contract was laid in and marked "Exhibit G."

Mr. BALDWIN: We except to its admission as being irrelevant.

F. B. HALL, *Judge.*

32 EXHIBIT "G."

Memorandum of agreement by and between the New England Terminal Company, a corporation organized and existing under the general stock laws of the State of Connecticut, party of the first part, hereinafter called the terminal company, and the New York & New England Railroad Company, a corporation organized and existing under the laws of the State of Massachusetts, Rhode Island, Connecticut, and New York, party of the second part, hereinafter called the New England Company, and the Housatonic Railroad Company, a corporation organized and existing under the laws of the State of Connecticut, party of the third part, hereinafter called the Housatonic Company, and the Danbury & Norwalk Railroad Company, a corporation organized and existing under the laws of the State of Connecticut, party of the fourth part, hereinafter called the Danbury Company, witnesseth; that—

Whereas the formation of a through transportation line to New York city from Boston and other points on the line of said railroad companies partly by rail and partly by the navigation of Long Island sound, would be for the public interest, and will also facilitate the transportation business of the parties hereto.

Therefore, the parties hereto have mutually agreed together as follows:

First. The said terminal company will acquire terminal facilities in New York city and also at Wilson's Point in the town of Norwalk, in the State of Connecticut, and also at other points on Long Island sound, and Jersey City, in the State of New Jersey, and elsewhere, as may hereafter be determined by said terminal company.

Second. The terminal company will also acquire and own suitable steamboats, barges, car-floats, tugs and other vessels for transporting all the cars, freight, and passengers which shall be shipped over the through transportation line herein contemplated between Wilson's Point on Long Island sound and New York city and elsewhere.

33 Third. The said three railroad companies and the said terminal company will unite and do hereby unite in forming

a through transportation line from Boston and other points on the lines of said railroad companies to New York city and points southerly and westerly thereof by the use of the New York & New England system and of the Housatonic system to Hawleyville and by the use of the Danbury system from Hawleyville to Wilson's Point, and by the use of the facilities of the terminal company from Wilson's Point to New York and points southerly and westerly thereof.

Fourth. The said three railroad companies will respectively make, and do hereby agree to make, said through transportation line their sole transportation line from all points for through freight to or from New York city, so far as permitted by law and now existing agreements, and will also arrange for sending such passengers over said line as may desire to go that way.

Fifth. The terminal company shall charge, and the said three railroad companies shall pay to the said terminal company one dollar and ten cents ($1.10) per ton for all first-class freight, one dollar ($1.00) per ton for all second-class freight, ninety cents (90) per ton for all third-class freight, eighty cents (80) per ton for all fourth-class freight, seventy cents (70) per ton for all fifth-class freight, sixty cents (60) per ton for all sixth-class freight carried, and fifty cents (50) per passenger for all passengers carried between Wilson's Point and New York city either way, or such other charges and amounts as shall be fixed as hereinafter provided.

Sixth. All sums or amounts received by the terminal company from the said three railroad companies or either of them, under this agreement, shall be applied by it to the payment of the following sums, to wit:

(A.) All sums payable as interest on the bond and obligations outstanding from time to time of the terminal company.

(B.) All sums for expenses properly incurred by the terminal company in conducting all its transportation business.

34 (C.) All sums for taxes assessed against said terminal company on its property, and for all insurance and other usual expenses incident to all its business.

(D.) The sum of fifteen thousand dollars ($15,000) annually for the years eighteen hundred and ninety (1890) to eighteen hundred and ninety-nine (1899) inclusive, and the sum of forty-eight thousand dollars ($48,000) annually for the years nineteen hundred (1900) to nineteen hundred and nine (1909) inclusive, to the trustees of the sinking fund of a certain mortgage hereinafter more particularly described.

(E.) Such sum as the terminal company may require to keep its equipment and other property intact and to replace such as may depreciate in value or be worn out or damaged.

Seventh. In case the amount so charged and received by the terminal company for freight and passengers from the said three railroad companies at the rate hereinbefore stated, or at the rate hereafter fixed shall at any time be found insufficient or shall be found more than sufficient to make the payments hereinbefore provided to be made therefrom, and in addition a dividend of not exceeding ten

per cent. (10 per cent.) per annum upon its capital stock, then on one month's previous notice to the railroad companies, the said charge shall be increased or decreased as the case may be to such a sum as shall in the opinion of the directors of the terminal company be sufficient and not more than sufficient to make all such payments from the amount received therefrom, and the freight and passengers received by the said terminal company thereafter and originating upon the lines of the three respective railroad companies, shall be paid for at such increased or decreased rate, as the case may be, instead of at the rate herein fixed in article fifth.

Eighth. All rates for freight and passengers upon said through transportation line shall at all times be as low as rates made by other competing lines unless otherwise determined by the officers of all the companies parties hereto, and all sums received for freight and passengers so carried after the deduction therefrom of the amount due to the terminal company under this contract,
35 shall be divided between the said three railroad companies, in the proportion of the actual mileage which such freight and passengers have been carried by said three railroad companies, and the car mileage or service shall be settled between the said three railroad companies on the basis of mileage as may be agreed upon as above by the said three railroad companies.

Ninth. The said terminal company is about to issue bonds or obligations and secure the same by a first mortgage of all its property, real and personal, such bonds to be for one thousand dollars ($1,000) and not to exceed in all eight hundred thousand dollars ($800,000) and to be payable, interest and principal, in gold coin of the United States, the principal being payable twenty (20) years from the date thereof, that is to say February 1st, nineteen hundred and nine (February 1, 1909), and the interest being payable at the rate of five per cent. (5 per cent.) per annum semi-annually on the 1st day of August and February of each year, such mortgage to be made to William H. Starbuck and Henry Hentz, trustees, and such mortgage to be in form approved by the counsel of said companies and to give a first lien upon all the property of said terminal company, including the real estate, steamboats, and all future-acquired property and said mortgage shall contain a sinking-fund provision under which there shall be paid to the trustees for the sinking fund the sum of fifteen thousand dollars ($15,000) per year on the 1st day of February, eighteen hundred and ninety (February 1, 1890), and of each year thereafter to and including the 1st day of February, eighteen hundred and ninety-nine (February 1, 1899), and the sum of forty-eight thousand dollars ($48,000) on the 1st day of February, nineteen hundred (February 1, 1900), and of each year thereafter, to and including the 1st day of February, nineteen hundred and nine (February 1, 1909), such sinking fund to be used by the trustees of the mortgage for the payment off of the bonds secured by said mortgage so far as they can be purchased after a proper
36 advertisement, at a rate not exceeding one hundred and ten per cent. (110 per cent.) and interest; and if bonds cannot be purchased at that rate or below, then said sinking fund shall be used

by the trustees in payment off at one hundred and ten per cent. (110 per cent.) and interest of the bonds secured by said mortgage, the bonds so to be paid off being selected by drawings to be made under regulations to be established by the said trustees.

Tenth. The said terminal company agrees that all the proceeds of said first-mortgage bonds shall be applied to the purchase of property for the said terminal company, to be covered by said mortgage, and it is understood and agreed that the said terminal company may also issue its other bonds, either second-mortgage or debenture bonds, not bearing more than six per cent. (6 per cent.) annual interest, to such an amount as may be found necessary for the purposes of the terminal company.

Eleventh. The said New England Company and the said Housatonic Company agree with the other parties hereto, to jointly and severally guarantee the payment of the interest and the sinking-fund charges upon the first-mortgage bonds hereinbefore referred to, and to execute a joint and several guaranty to that effect upon each of the said bonds, such form of guaranty to be substantially in the language following:

"For value received and pursuant to the contract dated —— —, 188–, mentioned in the within bond, the New York & New England Railroad Company and the Housatonic Railroad Company hereby jointly and severally guarantee to the bearer or to the registered holder of this bond, and to the bearer of every coupon appertaining thereto, the punctual payment of every such coupon according to its tenor, and also the punctual payment of $15,000 to the trustees of the sinking fund under a certain mortgage dated February 1, 1889, given to secure the series of bonds of which this is one, on February 1, annually, from 1890 to 1899, both inclusive, and of $48,000 on February 1, annually, from 1900 to 1909, both inclusive, according to the terms of said contract.

37 Signed and sealed with their corporate seals at ——, this — day of ——, 188–, by the New York & New England Railroad Company, by its vice-president and agent thereunto duly authorized; and by the Housatonic Railroad Company, by its president and agent thereunto duly authorized.

THE NEW YORK & NEW ENGLAND RAILROAD COMPANY,

[SEAL.] By —— ——, *Vice-president and Agent.*

THE HOUSATONIC RAILROAD COMPANY,

[SEAL.] By —— ——, *President and Agent.*

Twelfth. This contract shall continue and be operative until the 1st day of February, nineteen hundred and nine (February 1, 1909), and shall not then or thereafter terminate, except upon a year's previous notice in writing given by either party to each of the others.

Thirteenth. It is understood and agreed that the Housatonic Railroad Company, as the lessee of the Danbury Company, shall

during the continuance and existence of such lease, be the attorney and agent of the said Danbury Company at all times and in all matters relating to or under this agreement and its action as such agent or attorney shall in all respects bind the said Danbury Company.

In witness whereof the said The New England Terminal Company has hereunto set its corporate seal and the hand of its treasurer and caused the same to be attested by its secretary, and the said New York & New England Railroad Company has hereunto set its corporate seal and the hand of its president and caused the same to be attested by its assistant secretary, and the said Housatonic Railroad Company has hereunto set its corporate seal and the hand of its president and caused the same to be attested by its secretary, and the said Danbury and Norwalk Railroad Company has here-
38 unto set its corporate seal and the hand of its president and caused the same to be attested by its secretary, this 11th day of January, eighteen hundred and eighty-nine, executed in quadruplicate.

THE NEW ENGLAND TERMINAL COMPANY,

[SEAL.] (Signed) By M. E. STONE, *Treasurer.*

Attest: (Signed) A. J. PORTER, *Secretary.*

HOUSATONIC RAILROAD COMPANY,

[SEAL.] (Signed) By W. H. STARBUCK, *President.*

Attest: (Signed) M. E. STONE, *Secretary.*

NEW YORK & NEW ENGLAND RAILROAD COMPANY,

(Signed) By J. A. BOSTWICK, *President.* [SEAL.]

Attest: E. V. CARY,
Assistant Secretary.

THE DANBURY AND NORWALK RAILROAD COMPANY,

(Signed) By F. ST. JOHN LOCKWOOD, [SEAL.]
President.

Attest: (Signed) C. E. ROBINSON, *Secretary.*

STATE OF NEW YORK, }
City and County of New York, } *ss:*

Be it remembered, that on this 11th day of January, in the year one thousand eight hundred and eighty-nine, before me, Arthur W. Andrews, a notary public, duly appointed for and residing in the city and county of New York, in the State of New York, per-
39 sonally appeared Mead E. Stone, Andrew J. Porter, William H. Starbuck, Jabez A. Bostwick, and Edward V. Cary, with all of whom I am personally acquainted, who being by me severally

duly sworn did depose and say the said Mead E. Stone, for himself, that he is the treasurer of the New England Terminal Company, one of the corporations described in and which executed the foregoing instrument, in quadruplicate, and that he resides at New Brighton, Richmond county, New York; the said Andrew J. Porter, for himself, that he is the secretary of the said corporation, and that he resides at Bridgeport, in the State of Connecticut. And the said Mead E. Stone and Andrew J. Porter further severally say that they know the corporate seal of said corporation, that one of the seals which is affixed to said instrument (executed in quadruplicate as aforesaid) is such corporate seal of the said The New England Terminal Company, and that it was affixed thereto by order of the board of directors of said corporation, and that they signed their names thereto by like authority, the said Mead E. Stone as treasurer and the said Andrew J. Porter as secretary as aforesaid.

The said William H. Starbuck, for himself, that he is the president of the Housatonic Railroad Company, one of the corporations described in and which executed the foregoing instrument, in quadruplicate, and that he resides in the city of New York; the said Mead E. Stone, for himself, that he is the secretary of the said last-named corporation and that he resides at New Brighton, Richmond county, New York. And the said William H. Starbuck and Mead E. Stone further severally say that they know the corporate seal of said corporation last named, that one of the seals which is affixed to said instrument (executed in quadruplicate as aforesaid) is such corporate seal of the said Housatonic Railroad Company, and that it was affixed thereto by order of the board of directors of said corporation, and that they signed their names thereto by like authority, the said William H. Starbuck as president and the said Mead E. Stone as secretary, as aforesaid.

The said Jabez A. Bostwick, for himself, that he is the president of the New York & New England Railroad Company, one of the corporations described in and which executed the foregoing instrument, in quadruplicate, and that he resides in the city of New York; the said Edward V. Cary, for himself, that he is the assistant secretary of the said last-named corporation, and that he resides at Mont Clair, in the State of New Jersey. And the said Jabez A. Bostwick and Edward V. Cary further severally say that they know the corporate seal of said corporation last named, that one of the seals which is affixed to said instrument (executed in quadruplicate as aforesaid) is such corporate seal of the said New York & New England Railroad Company, and that it was affixed thereto by order of the board of directors of said corporation, and that they signed their names thereto by like authority, the said Jabez A. Bostwick as president, and the said Edward V. Cary as assistant secretary, as aforesaid.

In witness whereof I have hereunto set my hand and official seal the day and year first hereinabove written.

[NOTARIAL SEAL.]

(Signed) A. W. ANDREWS,
Notary Public (21), *N. Y. C. & Co.*

STATE OF CONNECTICUT, } ss:
County of Fairfield and Town of Norwalk, }

Be it remembered on this 15th day of January, in the year one thousand eight hundred and eighty-nine, before me, Le Grand C. Bett, a notary public duly appointed for and residing in the State of Connecticut, personally appeared F. St. John Lockwood and Charles E. Robinson, with both of whom I am personally acquainted, who being by me severally duly sworn did depose and say:

The said F. St. John Lockwood, for himself, that he is the president of the Danbury & Norwalk Railroad Company, one of the corporations described in and which executed the foregoing
41 instrument in quadruplicate, and that he resides in the town of Norwalk, Conn. The said Charles E. Robinson, for himself, that he is the secretary of the last-named corporation, and that he resides at Bridgeport, Fairfield county, Conn. And the said F. St. John Lockwood and Charles E. Robinson further severally say that they know the corporate seal of said corporation last named, that one of the seals which is affixed to said instrument (executed in quadruplicate as aforesaid) is such corporate seal of the said Danbury & Norwalk Railroad Company, and that it was affixed thereto by order of the board of directors of said corporation, and that they signed their names thereto by like authority, the said F. St. John Lockwood as president, and the said Charles E. Robinson, as secretary, as aforesaid.

In witness whereof I have hereunto set my hand and official seal the day and year first hereinabove written.

(Signed) LE GRAND C. BETT,
[SEAL.] *Notary Public.*

"A correct copy."

THE NEW YORK & NEW ENGLAND RAILROAD COMPANY
vs.
THE TOWN OF BRISTOL *et al.*
} Superior Court, Hartford County, October 7, 1892.

Plaintiff's Appeal.

In the above-entitled cause the plaintiff appeals from the judgment of said court to the supreme court of errors to be held at Hartford, in and for the first judicial district, on the first Tuesday of January, 1892, for the revision of the errors which it claims to have occurred in the trial thereof, and for reasons of said appeal he assigns the following, viz:

1. Because the court erred in sustaining defendant's motion to strike out in the manner set forth in the first three paragraphs of the memorandum of decision filed December 18, 1891, against plaintiff's exception.

2. Because the court erred in ordering to be stricken out of paragraph 16 of the petition of appeal all after and including the word 'nor," in the second line thereof.

42 3. Because the court erred in ordering to be stricken out of said petition and appeal the whole of paragraph 15 unless amended in the manner stated in said memorandum.

4. Because the court erred in striking out each of the paragraphs from 2 to 10 inclusive.

5. Because the court erred in overruling the motion of the plaintiff to strike out the answer of the railroad commissioners and in holding against the exception of the plaintiff that said railroad commissioners were entitled under the statute to appear and plead and defend in the superior court in these proceedings.

6. Because the court erred in excluding the evidence offered by the plaintiff that in December, 1890, the railroad commissioners in a proceeding against the New York, New Haven & Hartford Railroad Company ordered the removal of a grade crossing of Morgan street in the city of Hartford in such manner as to require one-fourth of the expense of such removal to be paid by the State.

7. Because the court erred in admitting against the plaintiff's exception, evidence of the terms of the contract between the plaintiff and the New England Terminal Company, and in overruling plaintiff's objection that it was irrelevant.

THE NEW YORK & NEW ENGLAND R. R. CO.,
By SIMEON E. BALDWIN,
EDWARD D. ROBBINS, *Its Attorneys.*

I certify that the foregoing appeal was filed on the 7th day of October, 1892, and Edward D. Robbins of Wethersfield, recognized in the sum of one hundred dollars conditioned that the said N. Y & N. E. R. R. Co. shall prosecute said appeal to effect and pay all costs therein if it shall fail so to do, and said appeal is hereby allowed.

FRANCIS CHAMBERS,
Ass't Clerk.

43 THE NEW YORK & NEW ENGLAND RAILROAD COMPANY *vs.* TOWN OF BRISTOL *et al.* | Supreme Court of Errors. Appeal from Superior Court, Hartford County, Dec. 17, 1892.

Amendment to Reasons of Appeal.

The plaintiff amends its reasons of appeal by adding the following:

8. Because the court erred in holding that the statute under which said proceedings were had, as set forth in said order of the railroad commissioners, justified said order, instead of holding that it was no law, because contrary to the constitution of this State in that it takes the property of the plaintiff without just compensation and without due process of law.

9. Because the court erred in holding that the statute under which said proceedings were had, as set forth in said order of the railroad commissioners, justified said order, and in therefore affirming said order, and overruling the plaintiff's claim that said statute was void

as violating the Constitution of the United States, in that it impaired the obligation of the contracts made by said company with the holders of its bonds and preferred stock, by making it impossible for said company to pay the interest on its bonds and dividends on its preferred stock, as agreed between them and said company, and yet maintain and operate its railroad efficiently, and further in that it took the property of said company without due process of law, and denied to it the equal protection of the law.

10. Because the court erred in overruling the claim of the plaintiff in the twelfth paragraph of its petition of appeal, that said statute was void, and was no justification of said order, under the Constitution of the United States and the XIV amendment thereof.

11. Because the judgment does not meet the issues. There is no general finding of the issues against the plaintiff, and no finding as to issues raised in paragraphs 11 and 17.

Filed Dec. 19, 1892.

By SIMEON E. BALDWIN,
Its Attorney.

44 Superior Court, Hartford County.

CLERK'S OFFICE.

The above and foregoing is a true copy of record in said superior court.

Attest: C. W. JOHNSON, *Clerk.*

Supreme Court, Hartford County, *ss:*

CLERK'S OFFICE.

The above and foregoing is a true copy of record in said supreme court.

Attest: C. W. JOHNSON, *Clerk.*

45 At a supreme court of errors holden at Hartford, in and for the first judicial district of the State of Connecticut, on the 1st Tuesday of January, in the year of our Lord one thousand eight hundred and ninety-three.

Present: Hon. Charles B. Andrews, chief justice.
" Elisha Carpenter, }
" David Torrance, }
" Simeon E. Baldwin, } Associate judges.
" Augustus H. Fenn, }

THE NEW YORK AND NEW ENGLAND RAILROAD COMPANY
versus
THE TOWN OF BRISTOL, HENRY W. GRIDLEY, SAMANTHA Churchill, John B. Churchill, Augusta Churchill, Sarah C. Richards, A. H. Funck, William Linstead, Henry A.
46 Seymour, Rachel Nott, Charles E. Nott, Julius R. Mitchell, and Drusilla Mitchell, all of the Town of Bristol, and The Society of Trinity Church, Bristol Savings Bank, and The Bristol National Bank, all Corporations Located in said Town of Bristol; George M. Woodruff, of Litchfield; W. H. Hayward, of Colchester, and William O. Seymour, of Ridgefield, Railroad Commissioners of the State of Connecticut.

This action, by petition appealing from the order of the railroad commissioners dated March 2d, 1891, requiring the removal of the grade crossing of the plaintiff's railroad and Main street, in the town of Bristol, as on file, came to the October term, 1890,
47 of the superior court for Hartford county, and thence by continuance to the October term, 1891, of said court, when judgment was rendered in favor of the defendants and the order of the railroad commissioners appealed from was affirmed.

An appeal to this court was filed and allowed.

And now, said cause having been fully heard, this court doth adjudge that in the record transmitted to this court there is no error.

48 *Opinion of Supreme Court of Errors of the State of Connecticut in—*

THE N. Y. & N. E. R. R. Co.
vs.
THE TOWN OF BRISTOL *et al.*

Appeal from commissioners.

The danger of grade crossings has received the attention of the General Assembly of this State on numerous occasions. That every such crossing is a menace to human life is recognized, and repeated enactments, each supposed to be more stringent and effective to lessen the danger than former ones, have from time to time been passed. Indeed the legislative will seems not to have become settled that all such crossings shall be removed without unnecessary delay.

To carry out this determination the General Assembly, at its session in 1889, passed an act entitled "An act relating to grade crossings," which contains these provisions (the whole act, chapter 220 of the Public Acts of 1889, is noted in the margin):

"The directors of every railroad company which operates a railroad in this State shall remove or apply for the removal of at least one grade crossing each year for every sixty miles of road operated by it in this State, which crossings so to be removed shall be those which in the opinion of the directors are among the most dangerous ones

upon the lines operated by it, and if the directors of any rail-
49 road company fail so to do the railroad commissioners shall,
if in their opinion the financial condition of the company will warrant, order such crossing or crossings removed as in their opinion the said directors should have applied for the removal of under the above provisions, and the railroad commissioners in so doing shall proceed in all respects as to method of procedure and assessment of expenses as if the said directors had voluntarily applied therefor." In an earlier part of the same section the rule of procedure to be followed by the commissioners in making such order is given, viz: "And if the aforesaid petition is brought by the directors of any railroad company or in behalf of any railroad company they shall order the expense of such alterations or removals, including the damages to any person whose land is taken, and the special damages which the owner of any land adjoining the public highway shall sustain by reason of any change in the grade of any such highway in consequence of any change, alteration, or removal ordered under the authority of this act to be paid by the railroad company owning or operating the railroad in whose behalf the petition is brought."

All the prior statutes respecting grade crossings had been permissive. They had authorized the directors of any railroad or the proper officers of a municipality to apply to the railroad commissioners for an order by which some grade crossing should be removed. None of them had made it compulsory upon any one to ask for such an order nor had they laid the duty upon any one to take the steps necessary to remove such crossings. As expenses—sometimes quite large expenses—would be incurred in the changes incident to such removal, perhaps it is not strange that those
50 statutes had done very little to abate the evil aimed at. The legislature of 1889 proceeded to apply a more rigorous rule. While leaving the permissive features of the former acts to remain in force, they commanded the directors of every railroad in the State to remove or to apply for the removal of a certain ratable number of the most dangerous grade crossings on the roads operated by them. But the railroad directors were interested and might not obey the command, and another provision was added. Jurisdiction was conferred on the railroad commissioners. It is this last provision which the present case brings before the court for examination. What is the power of the railroad commissioners conferred by the act and how must they proceed?

In arriving at the legislative intent as expressed in any statute it is always expedient to recur to the circumstances which surrounded the legislature at the time the statute was passed. In 1889 there was an urgent public demand for efficient legislation to remove the danger arising from grade crossings. At that time the Asylum-street bridge commission was about finishing its labors. That commission had been created by the legislature and directed to take such steps as were needed to remove a grade crossing in Asylum-street, in the city of Hartford. The validity of that commission had been established. Its efficiency and success had been

demonstrated. In that instance by the instrumentality of a commission one grade crossing of exceptional danger had been removed. That was a precedent which might safely be followed. All grade crossings were dangerous, although not so highly dangerous as the one in Asylum street. A special commission was needed for the removal of that one, but in ordinary cases a general commis-
51 sion would be adequate. In the Asylum-street case the legislature acted because the railroad and the municipality neglected to act. That commission was successful because it was the instrument of the supreme power of the State. If in other cases the directors of railroads disobeyed the commands of the statute and neglected to remove the dangerous crossings another commission acting in like manner by the supreme power of the State would be likely to be successful. In the one case the legislature had proceeded upon the theory that the Asylum-street crossing was a nuisance dangerous to human life. Now the legislature was about to proceed upon the theory that all such crossings were nuisances dangerous to human life. Reading the statute now in question in the light of these circumstances, it is impossible not to believe that the legislature intended to invest the railroad commissioners in the cases of grade crossings over which they were given jurisdiction by this act with power of the same kind and clearly analagous to the power with which the special commission had been invested. The general commission, like the special one, was to be an instrumentality of the supreme power to remove dangerous nuisances.

What was said by this court of the statute which created that special commission may with equal justice be said of the statute of 1889; "In scope and purpose it concerns the protection of life. Neither in intent nor fact does it increase or diminish the assets of any railroad corporation. It is the exercise of the governmental power and duty to secure safe highways. The legislature having determined that the intersection of a railway with any highway at grade is a nuisance dangerous to life, in the absence of action on the part of the municipality or of the railroad may compel them
52 to become the owner of the right to lay out new highways and new railways over such land and in such manner as will separate the grade of the railway from that of the highway at intersections; may compel them to use the right *the right* for the accomplishment of the desired end; may determine that the expenses shall be paid by either corporation alone or in part by both, and may enforce obedience to its judgment; that the legislature of the State has the power to do all this for the specified purpose and to do it through the instrumentality of a commission it is now only necessary to state, not to argue." On the 12th day of March, 1891, the railroad commissioners, intending to obey the command contained in the said act and to conform to the rule of procedure therein prescribed, issued an order in which, after reciting that the directors of the New York and New England Railroad Company had failed to remove or apply for the removal during the year ending August 1st, 1890, of any grade crossing of a highway which crossed or was crossed by their

railroad, and that in their (the railroad commissioners') opinion the said directors should have applied for the removal of the grade crossing of their road and the highway known as Main street in the town of Bristol, and also the various notices, appearances, and hearings that had been had in the matter, they ordered and directed as follows: "And now, after such notices and hearings, we, being of opinion that the financial condition of the said New York and New England Railroad Company will warrant such order and the public safety requires the same, do hereby order such crossing removed, and do determine and order that the following alterations, changes, and removals be made and done, to wit: That the
53 method of crossing be altered so that said highway, instead of crossing said tracks at grade, as at present, be carried under said tracks, and for that purpose that the location of said crossing be changed by the removal of said tracks" (&c., &c., setting out minutely the changes to be made), "all of said changes and alterations and removals to be made and done by said railroad company and the expenses thereof, including the damages to any person whose land is taken and the special damages which the owner of any land adjoining the public highway shall sustain by reason of any change in the grade of such highway in consequence of any change, alteration, or removal ordered, to be paid by said railroad company."

From that order the said railway company made the present appeal to the superior court in Hartford county. They made the town of Bristol, the railroad commissioners, and divers other parties defendants, and caused notice to be served on them to appear and make answers.

In the superior court there were various pleadings filed, sundry motions were made, and there were orders thereon. There was a hearing and judgment affirming the order of the railroad commissioners and a finding of facts as follows:

"Said railroad company is and at the date of said order was of sufficient ability to execute said order of the railroad commissioners, and the financial condition of said company was at the time of the making of said order and is such as to warrant the order for the removal of said crossing. Said crossing so ordered to be removed is one of the most dangerous ones upon the line of said railroad, and the said order was necessary for the safety of the public. At the commencement of the trial the plaintiff moved to strike out the answer of the railroad commissioners upon the ground that
54 they were not entitled under the statute to appear and defend in said proceeding in this court.

The court denied the motion, and the plaintiff excepted to said ruling. Plaintiff offered to prove that in December, 1890, the railroad commissioners in a proceeding against the N. Y., N. H. and H. R. R. Co. ordered the removal of a grade crossing of Morgan street, in the city of Hartford, in such manner as to require one-fourth the expenses of such removal to be paid by the State. Said evidence was offered in support of the allegation in paragraph 17 of plaintiff's petition. Upon objection of the defendant the court

excluded the evidence, and the plaintiff excepted to said ruling." From that judgment the railroad company has appealed to this court. The several grounds of appeal as they are mentioned in the appellant's brief are:

1st. That the railroad commissioners were not entitled to appear and defend.

2nd. That the statute is unconstitutional.

3rd. That the order expunging various paragraphs of the appeal was erroneous.

4th. That it was error to reject the evidence concerning the Morgan-street order.

5th. That it was error to admit the evidence concerning the N. E. Terminal contract.

6th. That all the issues are not disposed of by the judgment.

There was no error in overruling the plaintiff's motion, not made till the opening of the trial, that the answer of the railroad commissioners be stricken out on the ground that they were not
55 entitled to appear in the matter. The plaintiff having caused the commissioners to be brought into court and having joined issue with them upon their answer, were not in a position to ask that they be denied an opportunity to be heard; but without this we think the relation of the railroad commissioners in these proceedings to the State and to the railroad company was so analogous to the position of the special commission in Asylum-street bridge case that they rightfully were there in court. They represented the State.

The statute is in its operation an amendment to the charter of each of the railroad corporations affected by it. It imposes on the plaintiff, being a corporation of that kind, an obligation which previous to its passage the charter of the plaintiff did not impose; but as that charter contained the provision that it might be altered at pleasure by the legislature, the statute is binding upon it.

All general laws and matters of police regulation affecting corporations are binding upon them without their assent. The N. Y. & N. E. R. R. *vs.* Waterbury, 60 Conn., 1; English *vs.* N. H. & H. Co., 32 Conn., 240; Bulkley *vs.* N. Y. & N. H. Co., 27 Conn., 479; Bridgeport *vs.* N. Y. & N. H. Co., 36 Conn., 264. That the legislature may rightfully and constitutionally impose such additional obligations upon a railroad company it is now too late to question. The N. Y. & N. E. R. R. Appeal from R. R. Commissioners, 58 Conn., 532. Such legislation violates no contract, takes away no property, and interferes with no vested right. Woodruff *vs.* Catlin, 54 Conn., 277; Woodruff *vs.* N. Y. & N. E. R. R., 59 Conn., 63; The People *ex rel.* Kimball *vs.* B. & O. R. R., 70 N. Y., 569; Railroad Company *vs.* Richmond, 96 U. S. R., 521; Cooley Const. Lim. (5th ed.), 672. As stated above, the act
56 of 1889 retains the permissive features of prior enactments and authorizes the railroad commissioners to act in the removal of a grade crossing upon the application of the selectmen of any town, but provides that in such case the town shall be required to pay not more than one-fourth the expenses. An application under that part of the statute arose in the town of Killingly and

is the case reported in the 58 Conn., 532, the N. Y. & N. E. R. R. appeal. It was strenuously argued in that case that the statute was unconstitutional. This court then said: "The policy of the State now is to abolish these grade crossings as rapidly as can be reasonably done. Legislation on this subject assumes that each party in the discharge of its duty is concerned in creating the danger and that each party may justly be required to contribute to the expense of its removal or that either may be required to pay the whole, and if each contributes that the proportion that each shall pay may be determined by the legislature in each case as it arises or by a general rule, by itself or by a delegation of its powers to the railroad commissioners. This exercise of power is justifiable on the ground that government itself, in the discharge of its governmental duties, undertakes to remove the danger, and does it in the same manner and through the same instrumentalities that it provides and maintains highways through and at the expense of towns and other corporations. So far as towns are concerned, it is a duty that has ever devolved upon them to keep the highways reasonably safe. They are compelled to act without compensation or pecuniary profit. Their sole motive is the public welfare.

Railroad companies, in some sense, are but agents of the government in affording to the public a more expeditious and vastly improved method of travel. As a compensation for their
57 capital and labor invested they are permitted, as turnpike companies formerly were, to charge the public for the use of their ways. Unlike towns, they do not act upon compulsion, but by choice. Their motives are private gain, public benefit is incidental. Advantage to the public is a reason for granting the franchise, but the enterprise is essentially a private one. They contribute largely to the danger and the State may well require them to contribute largely to its removal." * * *

"Grade crossings are called, not in every sense, perhaps, nuisances. It is not claimed that they are indictable or that either party, in the absence of negligence, would be civilly liable; yet they are in the nature of nuisances and are literally within Blackstone's definition, 'Anything that worketh hurt, inconvenience, or damage.' We think it is competent for the State to cause them to be abated, and they may require any party responsible for their existence to pay any part or all of the expenses. That being so, requiring the railroad company to pay three-fourths of the expense, however just it might be to require the town to pay more than one-fourth, it is not a matter of which the railroad company can legally complain. The statute may operate harshly, as all statutes are liable to in certain cases, but it is not unconstitutional."

It being established by the legislature and by the repeated decisions of this court that grade crossings are in the nature of nuisances and dangerous to life, the right of the legislature to cause them to be abated and to require either party to pay the whole or any portion of the expense cannot be questioned. Raymond *vs.* Fish, 51 Conn., 80; Dunham *vs.* New Britain, 55 Conn.,

378; State *vs.* Worden, 56 Conn, 216; Miller *vs.* Horton, 152 Mass.,
58 540. A further question raised by the plaintiffs under the second reason of appeal is that the statute is unconstitutional because it authorizes the railroad commissioners to make their own jurisdiction. This objection cannot be sustained. The jurisdiction given to the railroad commissioners to proceed on their own motion to order the removal of any grade crossing in any particular instance depends on two conditions—first, the failure of the directors to remove or apply for its removal; of such failure the railroad commissioners would have official knowledge; second, the opinion of the commissioners that the crossing is one for the removal of which the directors ought to have applied, and their opinion that the financial condition of the railroad company is such as will warrant the order. It is a sound rule of construction that when a statute gives discretionary power to any person to be exercised by him upon his own opinion of certain facts that the statute makes him sole and exclusive judge of the existence of those facts. Martin *vs.* Mott, 12 Wheaton, 9, 29; Story, J. (Luther *vs.* Borden, 7 Howard, 45, Taney). There is really no occasion for the application of this rule of construction. The right of appeal being afforded, the plaintiff could not be harmed by any finding the commissioners should make. They had the right to be, as in fact they were, fully heard in the superior court upon all the disputed questions in the case. It was admitted—certainly it was not denied—that the plaintiff's directors had neglected to comply with the legislative command to remove grade crossings; and it is found that the one ordered to be removed by the commissioners was one of the most dangerous ones upon the line of the railroad,
59 and that its removal was necessary for the public safety, and that the financial condition of the plaintiff was such as to warrant the order made by the commissioners. In the third reason of appeal the plaintiffs claimed to be aggrieved because certain of the paragraphs of their original application were expunged. Giving the most liberal construction to the statute in favor of the plaintiffs, the only questions in the case which were material or upon which there could be any issue were, 1st, whether or not the plaintiffs' directors had removed or applied for the removal of a grade crossing, as required by the statute; 2d, whether or not the grade crossing ordered to be removed by the commissioners was in fact a dangerous one and one which the directors ought to have removed or for the removal of which the directors ought to have applied; 3d, whether or not the financial condition of the plaintiff was such as to warrant the order. The practice act forbids a party to set out in its pleadings the evidence by which the material facts are to be proved. All the averments expunged from the plaintiffs' application were statements of evidential facts tending to show the plaintiffs' financial condition. They were properly stricken out. The order made by the railroad commissioners in the case of the Morgan-street crossing was properly rejected. That order was made under another part of the statute and was against another railroad company. It was a matter between other parties.

Bethlem *vs.* Watertown, 47 Conn., 237; Burdick *vs.* City of Norwich, 49 Conn., 225; Greenleaf on Ev., sect. 524.

If the superior court erred in admitting *the* evidence the contract made by the plaintiffs with the New England Terminal Co., we are not able to see how the plaintiff was injuriously affected. It was an immaterial error, and according to section 1125 of the general statutes we ought not to reverse the judgment or grant a new trial for that reason. It fully appears that all the material issues in the case were disposed of by the finding and the judgment. There is no error in the judgment appealed from.

The President of the United States to the Town of Bristol, Henry W. Gridley, Semantha Churchill, John B. Churchill, Augusta Churchill, Sarah C. Richards, A. H. Frinck, William Linstead, Henry A. Seymour, Rachel Nott, Charles E. Nott, Julius R. Mitchell and Drusilla Mitchell, the Society of Trinity Church, the Bristol savings bank, the Bristol National bank, and to George M. Woodruff, W. H. Hayward, and William O. Seymour, railroad commissioners of the State of Connecticut, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States to be holden at Washington on the seventh day of April, 1893, pursuant to a writ of error filed in the clerk's office of the supreme court of errors of the State of Connecticut, wherein The New York and New England Railroad Company, a corporation under the laws of said State and a citizen thereof, is plaintiff in error and you are defendants in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in the said writ of error mentioned, should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States, this ninth day of March, in the year of our Lord one thousand eight hundred and ninety-three.

CHARLES B. ANDREWS,
Chief Justice of the Supreme Court of Errors of Connecticut.

HARTFORD COUNTY, *ss:*

HARTFORD, *March 13th*, 1893.

On said day I left with the town clerk of the town of Bristol, with the president of the Bristol National bank, and with the treasurer of the Bristol savings bank, the clerk of the Society of Trinity Church, and with or at the usual place of abode of the other within-named defendants, in the town of Bristol, true and attested copies of the within, and on the 16th day of March, 1893, a like copy with Wm. H. Hayward, at Colchester, and on the 17th day of March, 1893, like copies with and in the hands of Geo. M. Woodruff & Wm. O. Seymour, railroad commissioners.

Attest:

A. P. MOORE,
Dep. U. S. Marshal.

Fees.

Twenty services	$40 00
Twenty copies	10 00
Twenty-one endorsements	3 15
Travel	10 00
	$63 15

63 I, Charles W. Johnson, clerk of the supreme court of errors of the State of Connecticut and of the superior court in and for Hartford county, in said State, hereby certify that the following is a copy of the assignment of errors filed in my office as such clerk, with a certain writ of error from the Supreme Court of the United States to said supreme court of errors of said State, already returned by me to the clerk of the Supreme Court of the United States, in a case in which The New York and New England Railroad Company is plaintiff in error and The Town of Bristol, Henry W. Gridley, Semantha Churchill, John B. Churchill, Augusta Churchill, Sarah C. Richards, A. H. Frinck, William Linstead, Henry A. Seymour, Rachel Nott, Charles E. Nott, Julius R. Mitchell, Drusilla Mitchell, The Society of Trinity Church, The Bristol Savings Bank, The Bristol National Bank, George M. Woodruff, W. H. Hayward, and William O. Seymour are defendants in error.

64 In witness whereof I have hereunto set my hand and the seals of said courts respectively on this sixth day of March, 1893.

C. W. JOHNSON,
Clerk of the Supreme Court of Errors and of the Superior Court for the County of Hartford.

[Seal Supreme Court of Errors, Con.]
[Seal Superior Court, Hartford County, Ct.]

65 STATE OF CONNECTICUT, }
Hartford County. }

Supreme Court of Errors, March 5, 1893.

THE NEW YORK & NEW ENGLAND RAILROAD COMPANY }
vs. }
THE TOWN OF BRISTOL *et al.* }

Assignment of Errors.

In the above-entitled case the plaintiff in error hereby files with the writ of error from the Supreme Court of the United States to the supreme court of errors of the State of Connecticut its assignment of the errors which it claims to have been made in the trial thereof by the said supreme court of errors as follows:

1. The said court erred in holding that the statute under which were had the proceeding as set forth in the order of the railroad commissioners exemplified in the record of the case justified said

order and in affirming the judgment of the superior court in and for Hartford county affirming said order and in overruling plaintiff's claim that said statute was void as violating the Constitution of the United States in that it impaired the obligation of the
66 contracts made by said company with the holders of its bonds and preferred stock by making it impossible for said company to pay the interest on its bonds and dividends on its preferred stock as agreed between them and said company, and yet maintain and operate its railroad efficiently, and, further, in that it took the property of the company without due process of law and denied to it the equal protection of the law.

2. The said court erred in overruling the claim of the plaintiff in error in the twelfth paragraph of its petition of appeal from the railroad commissioners to the supreme court, as set forth in the record, that said statute was void and was no justification of said order under the Constitution of the United States and the fourteenth amendment thereof.

THE NEW YORK AND NEW ENGLAND RAILROAD COMPANY,
By EDWARD D. ROBBINS, *Its Attorney.*

Endorsed on cover: Case No. 15,294. Connecticut supreme court of errors. Term No., 917. The New York & New England Railroad Company, plaintiff in error, *vs.* The Town of Bristol, Henry W. Gridley, *et al.* Filed April 12th, 1893.

Office Supreme Court U. S.
FILED.
DEC 14 1893
JAMES H. McKENNEY,
CLERK.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1893.

No. 15,294.

THE NEW YORK AND NEW ENGLAND RAILROAD CO.,
Plaintiff in Error,

VS.

THE TOWN OF BRISTOL, HENRY W. GRIDLEY et al.

IN ERROR TO THE SUPREME COURT OF ERRORS OF THE STATE OF CONNECTICUT.

MOTION TO DISMISS OR AFFIRM.

HENRY C. ROBINSON,
JOHN J. JENNINGS,
Counsel for Defendant in Error.

HARTFORD, CONN:
PRESS OF THE CASE, LOCKWOOD & BRAINARD COMPANY.
1893.

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1893.

No. 15,294.

N. Y. & N. E. R. R. COMPANY
vs.
TOWN OF BRISTOL,
GEORGE M. WOODRUFF ET AL.,
Railroad Commissioners et al.

ERROR TO THE SUPREME COURT OF ERRORS OF THE STATE OF CONNECTICUT.

MOTION TO DISMISS OR AFFIRM.

To the New York & New England Railroad Company, Plaintiff in Error:

Notice is hereby given you that a motion will be made in the above-entitled cause on the eight day of January, 1894, or as soon thereafter as counsel can be heard, to dismiss the writ of error or to affirm the judgment or decree of the Court below, upon the grounds and for the reasons and upon the authorities herewith served upon you with this notice.

Dated at Bristol, Conn., Nov. 20, 1893.

Henry C. Robinson
John J. Jennings

Attorneys for Defendants in Error, Railroad Commissioners of the State of Connecticut.

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1893.

No. 15,294.

N. Y. & N. E. R. R. COMPANY, *Plaintiff in Error*, *vs.* TOWN OF BRISTOL, GEORGE M. WOODRUFF ET AL., Railroad Commissioners *et al.*, *Defendants in Error.*	ERROR TO THE SUPREME COURT OF ERRORS OF THE STATE OF CONNECTICUT.

MOTION TO DISMISS OR AFFIRM.

And now come the defendants in error, George M. Woodruff *et al.*, Railroad Commissioners of the State of Connecticut, and move the Court to dismiss the writ of error in the above-entitled cause, and unite therewith a motion to affirm the decree and judgment of the Court of Connecticut, for the following reasons:

1. There is no federal question arising on the record filed in this Court.
2. No federal question arose in the trial Court, or in the Supreme Court of Errors of the State of Connecticut, which was decided against the title, right, privilege, or immunity set up or claimed by the plaintiff in error.
3. This case involves a statute whose construction by the State Court of last resort adverse to the plaintiff will be respected by this Court.
4. The Supreme Court of Errors of the State of Connecticut, the Court of last resort in that State, in construing a local statute, the one here in question, has ruled that the law is an

amendment of the charter of the plaintiff company, which charter is amendable at the will of the General Assembly of that State.

5. No federal question is necessarily involved in the judgment of the Court below.

6. It is manifest that the writ of error herein was taken for delay only.

7. The question on which jurisdiction depends is so frivolous as not to need further argument.

8. If there is a federal question involved in the judgment, the decision of the Court below is so clearly right that the writ of error should be dismissed, or the decree and judgment affirmed.

9. The General Assembly of the State of Connecticut in 1889 passed "An Act relating to Grade Crossings" (*Infra*, p. 6), which provided, among other things, that the directors of every railroad company should remove, or apply for the removal of, at least one grade crossing each year for every sixty miles of road operated by it in that State, which should be those in the opinion of the directors most dangerous, and if the directors failed so to do, the Railroad Commissioners must, if in their opinion the financial condition of the company warranted it, order such crossing or crossings to be removed as in their opinion the said directors should have removed. In pursuance of this act the Railroad Commissioners summoned the railroad company and all parties interested before them, and, after numerous hearings, extending over the space of four months, ordered that the crossing in question should be forthwith removed, in accordance with certain plans and specifications prepared by the railroad company. (See Exhibit "A," Record, pp. 6–9.) The plaintiff in error appealed from this order to the Superior Court, a court of general jurisdiction, and the highest *nisi prius* tribunal in the State, and in its petition set up the following reasons why the order should be reversed (see Record, pp. 3–5, 6, 18, and Appeal in final form, *infra*, p. 10):

(1) That the company was not of sufficient ability to execute the order, and that its financial condition did not warrant the making of such order.

(2) That the company could not meet the expenses of executing the order and have enough income left to pay its fixed charges and maintain its railroad in good and proper condition.

(3) That the law and the order of the Commissioners were void, as violating both the Constitution of the United States and the Constitution of the State of Connecticut, in that it impaired the obligation of the contracts made by said company with the holders of its bonds and preferred stock by making it impossible for said company to pay the interest on its bonds and dividends on their preferred stock, as agreed between them and said company, and yet maintain and operate its railroad efficiently.

(4) That the order was not necessary for the safety of the public."

After a full trial upon the merits, the Court found that the plaintiff in error was of sufficient ability to execute said order, and that its financial condition warranted the making of such order; that said crossing was one of the most dangerous ones upon the line of the railroad, and that said order was necessary for the safety of the public. (Record, p. 19.) On the 7th of October the plaintiff in error appealed from said judgment to the Supreme Court of Errors for the State of Connecticut, to be holden on the first Tuesday of the following January, in which appeal no constitutional question was raised. (Record, p. 27.) On the 19th of December one of the learned attorneys of the plaintiff in error filed an amendment to the appeal, raising questions of constitutional law. (Record, p. 28.) The questions submitted to the Supreme Court of Errors were chiefly matters of evidence and practice. The Court found that there was no error in the judgment of the Superior Court.

(1) In construing the statute the Court held that under the laws of the State of Connecticut the statute in question became upon its passage an amendment of the charter of the plaintiff in error.

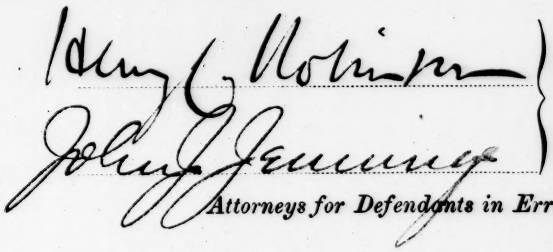
(2) That the statute properly treated crossings as nuisances subject to abatement at the expense of any party causing or contributing to the result under the police powers of the State.

(3) That the statute was a governmental act of the supreme power enacted to preserve human life.

10. There was no property of the company taken, and the duty which the order imposed was by due process of law and of laws of equal protection.

11. The writ of error was not allowed by this Court or by the Chief Justice or any Associate Justice.

Wherefore the defendants in error pray that the writ of error be dismissed or the decree and judgment of the Court of Connecticut be affirmed.



Attorneys for Defendants in Error.

NOTE.

Counsel for the convenience of this Court here point out the material and immaterial parts of the transcript of record.

The doings of the Railroad Commissioners are set forth in Exhibit "A," found at pp. 6–8.

The petition of appeal was amended by the plaintiffs in error and corrected by the trial Court, and will be most conveniently consulted by reference to page 10 of the following brief.

For memorandum of decision of the trial Court see page 18, for the judgment see page 19, for the finding of facts see page 20.

For the reasons of appeal to the Supreme Court of Errors of Connecticut see page 27, and for the amendment thereto see page 28.

The opinion of the Supreme Court of Errors of Connecticut is found at pp. 30–37.

For the assignment of errors in this Court see pp. 38–39.

All other parts of the transcript of record are immaterial.

SUGGESTIONS IN SUPPORT OF MOTION.

STATEMENT.

The Legislature of Connecticut, acting with enlightenment and wisdom, and in harmony with the wisdom of other enlightened legislative and judicial bodies, have, in the interest of public safety, fulfilled their governmental duty in legislating for the separation of railroad and street highway travel. To this end, by many earlier statutes, permission was given to both railroad companies and municipalities to move in the matter of separating grades, wherever they cross, with the approval of the Board of Railroad Commissioners, a tribunal selected with great care and clothed with judicial and administrative powers. In 1889 the Legislature advanced a step and required, by a compulsory enactment, that each railroad company should, at its own expense, remove one such crossing a year for each sixty miles of its operated railroad. If a company failed in this duty, the Commissioners were commanded to order the removal of at least one of the most dangerous grade crossings at the company's expense, provided they should find, after fair hearing, that the financial condition of the company would warrant it. The statute, which bears upon all companies alike, is as follows:

CHAPTER CCXX.

AN ACT RELATING TO GRADE CROSSINGS.

Be it enacted by the Senate and House of Representatives in General Assembly convened:

"The selectmen of any town, the mayor and common council of any city, the warden and burgesses of any borough within which a highway crosses or is crossed by a railroad, or the directors of any railroad company whose road crosses or is crossed by a highway may bring their petition in writing to the railroad commissioners, therein alleging that public safety requires an alteration in such crossing, its approaches, the method of crossing, the location of the highway or crossing, the closing of a highway crossing and the substitution of another therefor, not at grade, or the removal of obstructions to the sight of such crossing, and praying that the same may be ordered; whereupon the railroad commissioners shall appoint a time and place for hearing the petition, and shall give such

notice thereof as they judge reasonable to said petitioner, the railroad company, the municipalities in which such crossing is situated, and to the owners of the land adjoining such crossing and adjoining that part of the highway to be changed in grade; and after such notice and hearing, said commissioners shall determine what alterations, changes, or removals, if any, shall be made and by whom done; and if the aforesaid petition is brought by the directors of any railroad company, or in behalf of any railroad company, they shall order the expenses of such alterations or removals, including the damages to any person whose land is taken, and the special damages which the owner of any land adjoining the public highway shall sustain by reason of any change in the grade of such highway, in consequence of any change, alteration, or removal ordered under the authority of this act, to be paid by the railroad company owning or operating the railroad in whose behalf the petition is brought; and in case said petition is brought by the selectmen of any town, the mayor and common council of any city, or the warden and burgesses of any borough, they may, if the highway affected by said determination was in existence when the railroad was constructed over it at grade, or if the layout of the highway was changed for the benefit of the railroad after the layout of the railroad, order an amount not exceeding one-quarter of the whole expense of such alteration, change, or removal, including the damages, as aforesaid, to be paid by the town, city, or borough in whose behalf the petition is brought, and the remainder of the expense shall be paid by the railroad company owning or operating the road which crosses such public highway; if, however, the highway affected by such order, last mentioned, has been constructed since the railroad which it crosses at grade, the railroad commissioners may order an amount not exceeding one-half of the whole expense of such alteration, change, or removal, including the damages, as aforesaid, to be paid by the town, city, or borough in whose behalf the application is brought, and the remainder of the expense shall be paid by the railroad company owning or operating the road which crosses such public highway. The directors of every railroad company which operates a railroad in this state shall remove or apply for the removal of at least one grade crossing each year for every sixty miles of road operated by it in this state, which crossings, so to be removed, shall be those which in the opinion of said directors are among the most dangerous ones upon the lines operated by it, and if the directors of any railroad company fail so to do, the railroad commissioners shall, if in their opinion the financial condition of the company will warrant, order such crossing or crossings removed as in their opinion the said directors should have applied for the removal of under the above provisions, and the railroad commissioners in so doing shall proceed in all respects as to method of procedure and assessment of expense as if the said directors had voluntarily applied therefor.

"SEC. 2. The railroad commissioners may, in the absence of any application therefor, when in their own opinion public safety requires an alteration in any highway or highways crossed at grade by a railroad or by railroads belonging to or operated by more than one company, after a hearing had upon such notice as they shall deem reasonable to the railroad company or companies owning or operating said railroad or railroads, and to the selectmen of the town, mayor of the city, or warden of the borough within which said highway or highways are situated, and to the owners of the land adjoining said crossing, order such alterations in such highway or highways as they shall deem best, and shall determine and direct by whom such alterations shall be made, at whose expense, and within what time; *provided*, that in all cases arising under this section one-fourth of the expense, including damages and special damages, as aforesaid, shall be paid by the state and the remainder shall be assessed upon the railroad company or companies benefited by such order; *and provided*, that such alterations as are thus made at the primary instance of the railroad commissioners shall not be ordered so as to direct the construction of more than one bridge in any one year on any one railroad.

"SEC. 3. Railroad companies may take land for the purpose of this act in the manner provided by law for the taking of lands by railroad companies.

"SEC. 4. Whenever the railroad commissioners, upon an application brought under the provisions of section one of this act, shall find that any highway crosses or is crossed by the tracks of more than one railroad, and the tracks of such railroads are so near together that public convenience requires the work of separating the grades to be done under and in compliance with one order, they shall give notice to all the companies operating said railroads to appear before them and be heard upon the application, and after such notice and hearing said commissioners shall determine what alterations shall be made, if any, so as to separate the grades of all of said crossings at the same time, and they shall determine by whom such work shall be done, and they shall apportion the expense to be borne by the railroad companies between such companies in such manner as they, the said commissioners, shall deem proper.

"SEC. 5. Damages under the provisions of this act on account of any change of grade in highways shall be assessed in the same manner as in the case of land taken for railroad purposes; and the provisions of this act in relation to such damages for change of grade shall apply in the case of any order passed by the railroad commissioners or superior court since June 1, 1887, under the authority conferred by section 3489 of the general statutes.

"SEC. 6. The provisions of section 3491 of the general statutes in relation to appeals shall apply to any decision of the railroad commissioners under the authority of this act.

"SEC. 7. It shall be the duty of the railroad companies to maintain and keep in repair all structures erected over their tracks at any highway crossing, but it shall be the duty of the municipality in which the structure is situated to keep in repair the surface of the highway, including the planking or other surface material of the highway upon such structure.

"SEC. 8. The provisions of this act shall apply to any cause or application now pending before the railroad commissioners or superior court. All provisions of the general statutes which relate to sections 3483 and 3489 of the same shall be deemed to apply to the provisions of this act.

"SEC. 9. Sections 3483 and 3489 of the general statutes are hereby repealed, but no rights, duties, or obligations belonging to or imposed upon any parties by any judgments heretofore rendered, shall be impaired or altered by such repeal.

"Approved, June 19, 1889."

Section 3491 of the General Statutes referred to above in Section 6 was amended by Chapter 213 of the Acts of 1889, to read as follows:

"SEC. 3518. Any person aggrieved by any order of the railroad commissioners, upon any proceeding relative to the location, abandonment, or changing of depots or stations to which he was or ought to have been made a party, may appeal from the same to the superior court of the county in which the cause of appeal shall arise, within thirty days after the publication of such order, by a petition in writing with a proper citation signed by competent authority to all parties to said proceedings having an interest adverse to him, to be served upon them at least twelve days before the return day; and said court may hear said appeal and re-examine the question of the propriety and expediency of the order appealed from, either by itself or a committee, and shall proceed thereon in the same manner as upon complaints for equitable relief; and in case said order is not affirmed, may make any other order in the premises that it may deem proper and which might have been made by the Railroad Commissioners therein, and may award costs at its discretion. Such appeal shall be a *supersedeas* of the order appealed from until the final action of the court thereon, and said final order may be enforced by said court by attachment, mandamus, or otherwise, as it shall deem proper."

There were, in 1890, 1,147 grade crossings in the state, 267 of them being upon the railroad operated by the plaintiff in error, whose mileage in Connecticut is about 205 miles.

See Rep. R.R. Com. for 1890.

The law required this company to eliminate three grade crossings in that year. This law they disobeyed, and the commissioners, as required by the statute, selected the most dangerous crossing upon their line, being upon the principal street in the active manufacturing town of Bristol, and after due notice, and a full hearing covering four months of time, the commissioners adopted the company's own plans, and ordered a separation of the grades accordingly.

From this order the company appealed to the Superior Court, a court of general jurisdiction and the highest *nisi prius* tribunal in the State. The appeal, after corrections by the Court and amendment by the company, was in the following form:

"1. On the 2d day of March, 1897, the railroad commissioners of this State made an order to said company, requiring the removal of the grade crossing of its railroad and Main street in the town of Bristol, a full copy of which, marked Exhibit 'A,' is to be annexed hereto and filed herewith.

"2. Said company is not, and at the date of said order was not of sufficient ability to execute the work of making the changes required by said order, and its financial condition does not, and did not then warrant the making of such an order.

"11. Said company cannot meet the expenses of executing the said order of the railroad commissioners, and have enough income left to pay its fixed charges, including interest on its bonds issued as aforesaid and outstanding, and the dividends on its preferred stock issued as aforesaid, and maintain its railroad in good and proper condition.

"12. If the law under which the proceedings were had, as set forth in said order, justifies said order, then it and said law are void as running into the constitution of the United States and the constitution of the state of Connecticut, in that said order impairs the obligation of the contracts made by said company with the holders of its bonds and preferred stock by making it impossible for said company to pay the interest on their bonds and dividends on their preferred stock as agreed between them and the said company, and yet maintain and operate its railroad efficiently, and further in that it takes the property of said company without just compensation and without due process of law and denies to it the equal protection of the laws.

"16. Said order herein appealed from was not an order necessary for the safety of the public.

"17. Said order should have been so made, and proceedings leading up thereto had, if at all, under section 2 of the act of 1889, as that one quarter of the expense of its execution should be paid by the State."

There the parties were at issue upon the question of the financial ability of the company, and the judgment of the Railroad Commissioners upon that point, and upon the extremely dangerous character of the grade crossing was affirmed. The judgment of the Superior Court is as follows, found on page 18 of the Record:

THE NEW YORK & NEW ENGLAND RAILROAD COMPANY
vs.
TOWN OF BRISTOL, *et al.*, GEORGE M. WOODRUFF *et al.*, RAILROAD COMMISSIONERS OF THE STATE OF CONNECTICUT.

SUPERIOR COURT,
HARTFORD COUNTY,
July 29, 1892.

"This action, by petition appealing from the order of the Railroad Commissioners, dated the 2d day of March, 1891, requiring the removal of the grade crossing of the plaintiff's railroad and Main street in the town of Bristol, as on file, came to this Court on the first Tuesday of May, 1891, and thence by continuance to the present term, when the plaintiff and the defendants, Railroad Commissioners, George M. Woodruff, W. H. Hayward, and William O. Seymour, and Defendant Henry A. Seymour, appeared and were at issue to the Court as on file.

"And the Court having heard the parties, finds that the financial condition of the plaintiff railroad company will warrant the order of the Railroad Commissioners for the removal of the grade crossing in question, that said crossing is among the most dangerous ones upon the line of said railroad, and that the safety of the public requires its removal.

"Whereupon it is ordered and adjudged that the order of the Railroad Commissioners appealed from in this action be and the same is hereby affirmed.

"And it is further ordered that the New York & New England Railroad Company, the plaintiff, pay to the Railroad Commissioners, the defendants, their costs, taxed at dollars and cents.

By the Court,
C. W. JOHNSON, *Clerk.*"

The railroad company appealed from the rulings of the Superior Court to the Supreme Court of Errors of Connecticut, by appeal made October 7th, which raised no Federal question. More than two months afterwards, one of the company's learned attorneys added as an amendment constitutional points, none of which appear to have been contested below, or passed upon in judgment by the Superior Court. The constitutional question as to the law impairing bond contracts is disposed of by the absence of all facts in its favor and the

presence of the controlling fact twice adjudged, by the Commissioners and by the Superior Court, that the financial condition of the company warranted the order.

That the law is equal cannot be disputed because it applies to all railroad companies, and, if it did not, it would not be offensive to that clause of the Constitution. There remains only the single claim that the company's property has been taken without due process of law, and without the laws of equal protection by the provisions and enforcement of an act which the Supreme Court of Connecticut has construed to be an amendment by the Legislature of the railroad company's open charter.

BRIEF.

I.

The writ of error should be dismissed upon motion.

In September, 1890, the State of Connecticut, acting through its lawfully constituted tribunal, a Railroad Commission, consisting, as the Statute required, of an experienced lawyer, a competent engineer, and a practical business man, commenced proceedings against the New York & New England Railroad Company, which had neglected to remove any grade crossing upon its line, although positively required by the Statutes of the State to remove three in each year. This proceeding was, by the statutes, made compulsory upon the Commissioners. After a full and fair hearing, they ordered the Railroad Company to separate their own grade from the grade of Main Street, an ancient highway in the town of Bristol. The Commission considered the question of the financial ability of the Company, and found it abundantly able to remove this most dangerous grade crossing, and, after careful study of plans, adopted the plan submitted by the Company, and, on the 3d of February, 1891, made an order, in compliance with law, whereby it became the duty of the Company to separate the grades in accordance with their own plans.

The proceedings before and by the Commissioners are fully set forth in the transcript "Exhibit A," pp. 6–9.

From this order the Company appealed in April, 1891, according to law, thus superseding the order of the Commissioners.

After full hearing, the Honorable Superior Court affirmed the judgment of the Commissioners in all respects, and found, as a finality, that the Company was abundantly able to remove the crossing; and that the crossing was most dangerous; and that the safety of the public required its removal.

See Transcript of Record, pp. 18, 19.

Both these issues were made by the Company. See appeal, pp. 3–6, Transcript of Record.

The Company appealed, upon questions of evidence and practice, to the Supreme Court of Errors of Connecticut, and afterwards amended their reasons of appeal so as to be able to carry constitutional questions to the Supreme Court of the United States, to make

farther delay in case they failed upon their points of evidence and practice. The constitutional points they had raised before against the Statute, in a suit between the same parties as are now before your Honorable Court.

N. Y. & N. E. R. R. Co. vs. *R. R. Com.*, 58 Conn., 532.

To the judgment in the latter case, the Company had brought no writ of error to Washington.

Thus, after more than three years of endeavor to suppress them, the dangers of the crossing are continued, threatening human life each hour in the day, and for alleged causes which, we submit, are wholly frivolous, and relief to the public is prevented by the continuance of the cause. If we are right in our estimate of the claims of the plaintiff in error, it is clearly a case which falls within the rules and practice of the Court upon motions to dismiss the writ and, upon considerations of later suggestions in the brief, to affirm the judgment below.

McNulty vs. *California*, 149 U. S., 645;
Walston vs. *Nevin*, 128 U. S., 578;
Clark vs. *Hancock*, 94 U. S., 493;
Micas vs. *Williams*, 104 U. S., 556;
Swope vs. *Leffingwell*, 105 U. S., 3;
Whitney vs. *Cook*, 99 U. S., 607;
Hinckley vs. *Morton*, 103 U. S., 764;
Roby vs. *Colehour*, 146 U. S., 153.

II.

It is manifest from the face of the Record that there is no question in the suit which arises under Section 710 of the Statutes.

The plaintiff in error claims in its assignment of errors (see Record, p. 38) that the grade crossing statute of 1889 offends the 10th Section of the Federal Constitution as a law impairing the obligation of contracts, and the 14th amendment, by depriving it of property without due process of law and by denying it the equal protection of the laws.

If the statute is an exercise of the police powers of the State, it must be admitted that neither of these constitutional provisions can be invoked against it.

First. As to the impairment of a contract.

The contracts claimed to be impaired are the company's contracts with its bondholders and its contracts, so called, with shareholders for preference in dividends of profits, both of which kinds of contracts were authorized by the Legislature of Connecticut, by way of amendment of the company's charter, which power of continued amendment, as well as the power of alteration and repeal, abides in the Legislature.

(*a*) In reference to this claim it would be enough to say that it is only a claim based upon no fact in the finding, and, on the other hand, expressly adjudged by both the Commissioners and the Superior Court to be a false claim.

There is nothing then in the case whereon the plaintiff in error can stand to make its claim, and it necessarily falls out of the case and its discussion.

The absolute importance of evidence in the Record to enable the court to consider such a point is shown by the opinion in

Dow vs. *Beidelman*, 125 U. S., 680, at pp. 690, 691.

(*b*) But in no case could a law for the preservation of public safety be held to interfere with a person's contracts with his creditors, whether their claims are secured by lien or not.

What answer would it be to a mandate of a health board, ordering the abatement of a nuisance, that the owner of the property was in debt, or that his property, which he was using offensively, was subject to a mortgage?

The expense of regulating the use of property, and even the possibility of its loss by destruction, are written, as an underlying obligation in favor of public health and safety, upon every item of property in the community, and to this obligation as a part of the supreme law, owners, creditors, and lienors must conform.

No ruling can be found by any intelligent court that creditors of a private individual can interpose their claims and liens to exempt property from the expense of its safe use. How much more absurd is such a claim in behalf of property whose use is public, and by creditors whose claims exist by legislative act, and against the will of the supreme law-making power which made the credit possible?

It is well said in a very recent case tried in January of this year before the Supreme Court of Iowa

Ft. Dodge vs. *R. R. Co.*, 55 Am. and Eng. R. R. Cases, 58, that even where a road was in a receiver's hand, its obligations of this character must be met at the expense of creditors and everybody else. The language of the court is, "the burden attaches when the railroad is constructed."

It is to be noticed that this claim is so futile that, while it could have been made before this tribunal in many cases upon legislative acts regulating prices, etc., it doesn't seem to have been esteemed worthy of suggestion unless it were made in *Dow* vs. *Beidelman*, where it was alluded to by the Court in terms which contain no commendation.

(*c*) But it has been frequently held that the obligation of no contract is impaired by the governmental acts of a legislature in exercising the police powers of the State.

Stone vs. *Mississippi*, 101 U. S., 814;
Boyd vs. *Alabama*, 94 U. S., 645;
Beer Co. vs. *Mass.*, 97 U. S., 25;
Stone vs. *Farmers L. & T. Co.*, 116 U. S., 307;
Baker vs. *Boston*, 12 Pick., 184;
Thorpe vs. *Railroad*, 27 Vt., 149;
Barlow vs. *Gregory*, 31 Conn., 261;
Lake Hill vs. *Cemetery Co.*, 70 Ill., 191;
N. O. Gas Co. vs. *L. Light Co.*, 115 U. S., 650, 672.

Second. The statute is manifestly not offensive to the fourteenth amendment.

(*a*) It does not take any person's property.

It seems gratuitous, almost to the degree of impertinence, to attempt to even refresh the memory of the Court with its numerous and exhaustive decisions, that the exercise of the police power of a State does not offend this amendment, although the enforcement of the law brings expense and even confiscation to the property owner.

From many cases we select a few conspicuous ones:

Barbier vs. *Connelly*, 113 U. S., 27,

where the Court says, at page 31:

"But neither the amendment, broad and comprehensive as it is, nor any other amendment, was designed to interfere with the power

of the State, sometimes termed its police powers, to prescribe regulations to promote the health, peace, morals, education, and good order of the people."

And

Mugler vs. *Kansas*, 123 U. S., 623,

a case argued with great ability, and whose opinion is complete and exhaustive, citing all the important adjudications of this Court then outstanding, and from which we quote at page 669:

"Nor can legislation of that character come within the fourteenth amendment, in any case, unless it is apparent that its real object is not to protect the community, or to promote the general well-being, but, under the guise of police regulation, to deprive the owner of his liberty and property, without due process of law. The power which the States have of prohibiting such use by individuals of their property as will be prejudicial to the health, the morals, or the safety of the public, is not — and, consistently with the existence and safety of organized society, cannot be — burdened with the condition that the State must compensate such individual owners for pecuniary losses they may sustain, by reason of their not being permitted, by a noxious use of their property, to inflict injury upon the community. The exercise of the police power by the destruction of property which is itself a public nuisance, or the prohibition of its use in a particular way, whereby its value becomes depreciated, is very different from taking property for public use, or from depriving a person of his property without due process of law. In the one case, a nuisance only is abated; in the other, unoffending property is taken away from an innocent owner."

And, again, the very recent case of

Budd vs. *New York*, 143 U. S., 517,

a regulation of prices case, in which your late distinguished associate, Justice Blatchford, gives an opinion characterized by his usual accuracy and wealth of research.

These two cases last cited quote from nearly all the cases in the Supreme Court reports bearing upon this general subject.

If the authority of other tribunals were needed, they could be cited by the score.

We presume to quote from three States only. In a very recent case tried before the Supreme Judicial Court of Massachusetts, and decided last March,

In re Mayor, etc., Northampton, 55 A. & E. R. R. Cases, 31, the grade crossing laws of that State were discussed. Their constitutionality under the fourteenth amendment and under the Massachusetts Bill of Rights was not even questioned by the eminent counsel who were attacking them upon other grounds, and the Court says:

> "It is not denied that the subject of the crossing of highways and townways by railroads is one which the legislature may regulate, from time to time, either by general or special laws. The legislature may itself prescribe the manner in which a railroad shall cross a highway in a particular case, or may delegate to a board of public officers, or to commissioners appointed by a court, the power to prescribe the manner in which the general or special provisions of law on the subject may be carried into effect."

In the State of Connecticut this law and its predecessors, and a special law passed to ensure a separation of grades at Asylum Street, in the city of Hartford, have been passed upon a number of times, and in all the cases the fourteenth amendment has been invoked, and in each case held to be ineffectual.

Woodruff vs. *Catlin*, 54 Conn., 295.
Westbrook's Appeal, 57 Conn., 104.
N. Y. & N. E. vs. *Railroad Commissioners*, 58 Conn., 532.
Woodruff vs. *N. Y. & N. E. R. R. Co.*, 59 Conn., 65.
State's Attorney vs. *Branford*, 59 Conn., 402.
N. Y. & N. E. vs. *Waterbury*, 60 Conn., 9.

And see also

People vs. *B. & A. R. R. Co.*, 70 N. Y., 569.

(*b*) It can hardly be seriously claimed that there is an absence of due process of law by a railroad company which had its day in court, before the commissioners, and again before the Superior Court, and again before the Supreme Court of Errors. If the company has not had an opportunity to be heard, then the constitution and laws of the State do not afford any.

(*c*) Nor can the plaintiffs in error complain of inequality of legal protection. There are no discriminations in the law, excepting by way of tenderness to an embarrassed company, which the Court finds this company is not.

R. R. Co. vs. *Emmons*, 149 U. S., 367.
Davidson vs. *New Orleans*, 96 U. S., 104.
Wurts vs. *Hoagland*, 114 U. S., 606.

III.

That the enactment of the statute under discussion was an exercise of the police powers of the State seems too plain to require argument.

Its sole purpose is public safety. It deals only with the lives, limbs, health, and comfort of travelers upon these two classes of highways.

These purposes are included in every definition and description of these subtle powers, from the judicial utterances on the subject by this bench to the humblest text writer.

The horrors of the "deadly grade crossing" have stirred public sentiment to forcible expression and action, by legislatures, courts, railroad commissioners, not to speak of the columns of journals, and the voices of philanthropy. The elimination of these horrors is the sole object of the Connecticut statute, which, we submit, is equal, in wisdom and justice to all concerned, to any legislation to be found upon the subject. It aims to suppress a nuisance and has no other aim.

Should the Court desire the construction given to this and similar acts by the highest tribunals of the State, there are a number of decisions which are precisely in point.

In *Woodruff* vs. *Catlin*, 54 Conn., 277, in which the Federal constitution and the State constitution were invoked against a special law with precisely the same purpose, the Court, in an opinion written by the late Judge Pardee, one of the most eminent of our Supreme Court Judges, says at page 295,

> "The act, in scope and purpose, concerns protection of life. Neither in intent or fact does it increase or diminish the assets either of the city or of the railroad corporations. It is the exercise of the governmental power and duty to secure a safe highway. The legislature having determined that the intersection of two railways with a highway in the city of Hartford at grade is a nuisance dangerous to life, in the absence of action on the part either of the city or of the railroads, may compel them severally to become the owners of the right to lay out new highways and new railways over such land and in such manner as will separate the grade of the railways from that of the highway at intersection; may compel them to use the right for the accomplishment of the desired end; may determine that the expense shall be paid by either corporation alone or in

part by both; and may enforce obedience to its judgment. That the legislature of this State has the power to do all this, for the specified purpose, and to do it through the instrumentality of a commission, it is now only necessary to state, not to argue."

The opinion also elsewhere calls the grade crossing a nuisance.

In *Westbrook's Appeal*, ~~104~~ 57 Conn., 95, an earlier statute on the same subject was under discussion, and the Court says at page 104:

"The act in question is an exercise of the police power of the state. Its object is to change or remove certain conditions, lawful in themselves, but which have become a source of danger to life and property."

In *N. Y. & N. E. R. R. Co.* vs. *Commissioners*, 58 Conn., 552, the constitutionality of this particular statute was attacked by these very plaintiffs in error against these very defendants in error, and to the opinion in that case, which is too long to quote in a brief, this Court is respectfully referred.

The validity of the Asylum Street Bridge Commission act and of certain of its orders was again attacked by these plaintiffs in error in the case of *Woodruff* vs. *The New York & New England R. R. Co.*, reported in 59 Conn., at page 64. Many questions are discussed in the case, as there were fifty-two assignments of error, including the fourteenth amendment, and the police character of the act was declared. The dissent in the case was confined to the powers of the commission to make the particular order.

In the same volume in a case against the town of Branford the Court again construed this identical statute as in the interest of public safety, and declares the judicial character of the board of railroad commissioners.

See *State's Attorney* vs. *Selectmen of Branford*, 59 Conn., 411.

Another part of the grade crossing laws was attacked by these same plaintiffs in error, and the result reported in

N. Y. & N. E. R. R. Co. vs. *Waterbury*, 60 Conn., 1.

The opinion was written by the late lamented Judge Edward W. Seymour. We cite from it at a later stage in the argument, quoting here only these lines at page 9.

"There can be no doubt of the right of the legislature to require railroad companies to bridge their crossings of existing highways at their own expense."

The act under discussion was again considered by the Supreme Court in

Middletown vs. *R. R. Co.*, 62 Conn., 492.

The opinion of Judge Hall, at page 497, says:

> "The whole purpose and scope of the act of 1889 seems to be to facilitate the extinction of grade crossings. It is apparently directed wholly to this deadly menace to public safety."

The last case upon the subject is the case at bar.

It is incidentally worthy of notice that the Supreme Court of Connecticut, in its membership during these several decisions, has been subject to unusual changes and additions, and there has been no particle of dissent as to the character of these statutes.

It would be abundantly easy to show by the construction of similar statutes of other States by their highest courts, that they are universally regarded as governmental acts within the police powers of the sovereignty.

In view of the many and recent adjudications of this Court, which are in harmony with many other authorities, that the supremacy of public safety is so lodged in the police power of a sovereign State that it cannot be bound, hindered, or limited by the act or contract of any one body of legislators so as to bind succeeding legislatures, it is not deemed necessary to enlarge upon that point.

Nor is it necessary to refresh the memory of the Court with its many decisions in which it has emphatically declined to pass upon the wisdom or good judgment of the legislative supreme authority in exercising this power.

The views of the Court in this matter are concisely stated in

Railroad Co. vs. *Richmond*, 99 U. S., at page 528,

> "It is not for us to determine in this case whether the power (police power) has been judiciously exercised. Our duty is at an end, if we find that it exists."

And see

R. R. Co. vs. *Gibbes*, 142 U. S., 392.
Paulson vs. *Portland*, decided April 17, 1893.

IV.

In this connection it should be observed that the Connecticut General Assembly is absolutely peculiar in that it retains judicial as well as legislative powers.

The Constitution granted it no power, but limited its existing powers, and there still remain in that body powers which it has had since 1662, and even since 1639, powers judicial and paternal, which are not vested in any other American legislature.

This whole matter is fully set forth in the able and scholarly opinion of Judge Loomis, in

Wheeler's Appeal, 45 Conn., 306,

and were it necessary, it could be effectively argued that this whole legislation comes within those peculiar reserved powers of the General Assembly, which are enumerated in Wheeler's Appeal, and that, independently of the general police powers of legislative bodies, the Connecticut General Assembly has distinct and peculiar powers borrowed from the powers of the English Parliament, and from the King as *parens patriae*, which would fully justify the legislative act under consideration.

Judge Swift, perhaps the earliest writer of legal commentaries in this country, more than one hundred years ago, reported this as a principle of Connecticut law at pp. 75 *et seq.*, of his admirable treatise. (See Swift's System.)

V.

The act is clearly within the power of the legislature as amendatory of the charter of the company.

This charter, like the charters of all our railroad companies, was granted with legislative power over it of amendment, alteration, and repeal specifically inserted in it, and was from the first, therefore, subject to just such legislative control.

Mr. Tiedman, in his treatise upon the limitations of police power, which certainly is not open to the charge of partisanship in favor of such powers, states the general rule upon this branch of our case fairly at page 588.

> "If the power to repeal or amend the charter is reserved to the State, no question can arise; for in the exercise of the power to

amend, the legislature may require, as a condition of the continuance of the corporate existence, the observance of whatever police regulation it may see fit to establish, in the same manner and to the same extent, that it may impose conditions of every sort and kind, in the original grant of the charter."

The object and effect of this power to amend is well defined in Morawetz on Corp., par. 1095, and Black on Constitutional Prohibitions, par. 34.

The latter authority instances this very duty as a proper one to impose upon railroad companies under the power of amendment.

The case of *Worcester* vs. *R. R. Co.*, 109 Mass., 103, has been a leading one upon this point. It was argued with conspicuous ability, and the legislative power exercised under the law was unusual, not to say extreme. But the Court declared it to be within the amendatory power of the legislature over the company's charter, and, in harmony with so many other controlling cases, held that "the legislature is the exclusive judge" of the public necessities in such cases.

This principle has often been declared by the U. S. Supreme Court, as in the

Sinking Fund Cases, 99 U. S., 700,

relative to the amendatory powers of Congress, and

Water Works vs. *Schottler*, 110 U. S., 347,

relative to similar powers in state legislatures.

The act in question is expressly held by the Connecticut Supreme Court to be an amendment of this company's charter.

Transcript of Record, page 34.

And the Supreme Court of Connecticut says, in the case already cited of *N. Y. & N. E. R. R. Co.* vs. *Waterbury*, 60 Conn., at page 8.

> "The charter of the New York & New England Railroad Company is not what is called a close charter, but is subject to legislative amendment. All general laws and mere matters of police regulation, affecting corporations, are binding without their assent. *New Haven & Derby R. R. Co.* vs. *Chapman*, *38 Conn., 71*. The act in question has the effect of an alteration of the charter of a company, previously incorporated by a charter which did not impose the duty, but which contained a provision that it might be altered at the pleasure of the legislature. *Bulkley* vs. *New York & New Haven R. R. Co.*, *27 Conn., 479*."

The legislative power of amendment of this company's charter herein judicially announced, is of course indisputable. It was originally put in the charters of the antecedent companies to whose franchises the plaintiff in error has succeeded.

See Private Laws, Conn., Vol. IV, p. 912, § 18;
or Vol. V, p. 547, § 10.

and it is also amendable by the general laws of the State.

General Statutes, § 1909.

VI.

It is certainly unnecessary to argue that this act is no endeavor under the guise of a governmental power to confiscate property. It wears no guise. It is a direct fulfillment of a duty to the public by the Legislature. Should such a claim be raised, that the supreme law-making power, in enacting this statute, sought, under the guise of its police powers, to confiscate the property of its railroad corporations, it would be at once reduced to absurdity by the record in this case, wherein it appears that, by the solemn and final judgment of the highest local tribunals, the enforcement of the act in this instance is to remove a grade crossing whose "removal is required" for "the safety of the public."

Nor can it be necessary to argue that there is a public use of railroad property, and that the regulation of this use by the Legislature is continuous and complete.

In the case of

Georgia Banking Co. vs. *Smith*, 128 U. S., 174,

the opinion says, at pages 179–180:

> "The incorporation of the company, by which numerous parties are permitted to act as a single body for the purposes of its creation, or, as Chief Justice Marshall expresses it, by which 'the character and properties of individuality' are bestowed 'on a collective and changing body of men,' *Providence Bank* vs. *Billings*, 4 Pet., 514, 562.; the grant to it of special privileges to carry out the order of its incorporation, particularly the authority to exercise the State's right of eminent domain that it may appropriate needed property — a right which can be exercised only for public purposes; and the obligation,

assumed by the acceptance of its charter, to transport all persons and merchandise, upon like conditions and upon reasonable rates, affect the property and employment with a public use; and where property is thus affected, the business in which it is used is subject to legislative control. So long as the use continues, the power of regulation remains, and the regulation may extend not merely to provisions for the security of passengers and freight against accidents, and for the convenience of the public, but also to prevent extortion by unreasonable charges, and favoritism by unjust discriminations. This is not a new doctrine, but old doctrine, always asserted whenever property or business is, by reason of special privileges received from the government, the better to secure the purposes to which the property is dedicated or devoted, affected with a public use. There have been differences of opinion among the judges of this Court in some cases as to the circumstances or conditions under which some kinds of property or business may be properly held to be thus affected, as in *Munn* vs. *Illinois*, 94 U. S., 113, 126, 139, 146; but none as to the doctrine that when such use exists the business becomes subject to legislative control in all respects necessary to protect the public against danger, injustice, and oppression."

Nor need it be argued that the entire expense of abating a nuisance may be placed by the government upon a party making the nuisance, even though others contribute with him to the result.

See the Connecticut cases before cited.
Kingman and Other Petitioners, 153 Mass., 566.
People vs. *B. & A. R. R. Co.*, 70 N. Y., 569.

The decisions of this Court upon that point are assembled in the late case of

Railroad vs. *Gibbes*, 142 U. S., 386,

at page 395, and are controlling.

In the list is the case of

R. W. Co. vs. *Alabama*, 128 U. S., 174, 179.

And the Gibbes case, an important case for the treatment of the case at bar in many features, says, at page 395:

"In such instances, where the interest of the public and of individuals are blended in any work or service imposed by law, whether the cost shall be thrown entirely upon the individuals or upon the State, or be apportioned between them, is matter of legislative direction."

The power to apportion the expense of abating a nuisance among different parties necessarily includes the power to put the entire expense upon one class of contributors to the result. If the Legislature has this power, the wisdom or unwisdom of a special enactment doesn't affect the constitutionality of the act.

There were, in 1890, 1,005 miles of railroad in the State and 1,147 grade crossings (Railroad Commissioners' Report, 1890). The act, if obeyed, secures the elimination, at the expense of the companies, of sixteen grade crossings in each year. To seriously claim that such a law is unjust, unequal, or unfair, seems hardly worthy of discussion. It neither offends the fourteenth amendment of the Federal Constitution, nor any principle of natural justice or of any justice known to modern civilization. The requirement is more lenient to the railroad companies than the laws of sister States.

It is noticeable also that this feature of the law is only enforceable against such companies as have failed to contribute to the gradual elimination of grade crossings by removing such crossings as they themselves may select in compliance with other provisions of this act.

VII.

The Case at Bar Raises This Single Question.

Can a railroad company, which is a creature of the General Assembly and whose charter is and has always been amendable and repealable, successfully defy the merciful and enlightened efforts of that supreme body to protect life within the borders of the commonwealth, by laws which are approved by the best civilization of the day and sanctioned by the highest judicial tribunals, and all this after a full, fair, and impartial hearing before the highest judicial authorities of the State?

HENRY C. ROBINSON,
JOHN J. JENNINGS,
Counsel for Defendants in Error.

Office Supreme Court U. S.
FILED,
JAN 8 1894
JAMES H. McKENNEY,
CLERK.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1893.

No. 15,294.

THE NEW YORK AND NEW ENGLAND R. R. CO.,

Plaintiff in Error,

VS.

THE TOWN OF BRISTOL, HENRY W. GRIDLEY et al.

In Error to the Supreme Court of Errors of the State of Connecticut.

BRIEF

FOR PLAINTIFF

OPPOSING MOTION TO DISMISS OR AFFIRM.

EDWARD D. ROBBINS,
Counsel for Plaintiff in Error.

HARTFORD, CONN.:
PRESS OF THE CASE, LOCKWOOD & BRAINARD COMPANY.
1894.

STATEMENT.

In 1889 the Legislature of the State of Connecticut passed a law (Chap. 220 of the Public Acts of 1889), the provisions of which, so far as here in question, read as follows:

> "The directors of every railroad company which operates a railroad in this State shall remove or apply for the removal of at least one grade crossing each year for every sixty miles of road operated by it in this State, which crossings, so to be removed, shall be those which, in the opinion of said directors, are among the most dangerous ones upon the lines operated by it; and, if the directors of any railroad company fail so to do, the Railroad Commissioners shall, if, in their opinion, the financial condition of the company will warrant, order such crossing or crossings removed as, in their opinion, the said directors should have applied for the removal of under the above provisions; and the Railroad Commissioners, in so doing, shall proceed in all respects as to method of procedure and assessment of expense as if the said directors had voluntarily applied therefor."

The last clause has reference to the following provisions of the statute:

> "If the aforesaid petition is brought by the directors of any railroad company, or in behalf of any railroad company, they" (the commissioners) "shall order the expenses of such alterations or removals, including the damages of any person whose land is taken, and the special damages which the owner of any land adjoining the public highway shall sustain by reason of any change in the grade of such highway, in consequence of any change, alteration, or removal ordered under the authority of this act, to be paid

by the railroad company owning or operating the railroad in whose behalf the petition is brought."

In September, 1890, the Railroad Commissioners of the State of Connecticut made an *ex parte* finding that the plaintiff's directors had failed to remove or apply for the removal of any highway grade-crossing during the year ending August 1, 1890, and that, in the opinion of the commissioners, they should have applied for the removal of the Main Street grade crossing in the town of Bristol, and thereupon issued an order for a hearing of the town, the railroad company, and sundry land owners about the changes to be made. The hearing was had, and it appearing what the changes of the railroad and the highway were, which would be necessary for the removal of this grade crossing, these exceedingly expensive changes were ordered, and, under the order of the commissioners (if that is valid), are to be executed by the plaintiff at its sole expense.

The plaintiff appealed from this order to the Superior Court, and thence to the Supreme Court of Errors, on the ground chiefly that the order and the statute under which it was made violated certain provisions of the Constitution of the United States. (See pages 4 and 5 and 27–29 of the Record.)

The Supreme Court of Errors overruled plaintiff's claims under the Constitution of the United States, and their decision to this effect has been brought here for revision by a writ of error.

For the purposes of this motion to dismiss, it seems necessary to do no more than state the federal questions arising on the record.

I.

It is conceded that in Connecticut the existing grades of both the railroads and the highways crossing them were legally established. When plaintiff's railroad was built through the town of Bristol many years ago, the legislature had enacted a special law giving to plaintiff's predecessor the right to cross highways, but at the same time giving to all persons sustaining damage from interference by the railroad company with a highway the same rights as to a judicial assessment of damages which were given to persons whose land was taken. It is a matter of common knowledge that, in a large proportion of the cases, crossings were constructed as they now exist only because the public so demanded. If the public had so desired, the railroad in this uneven country might, without additional expense, have been constructed in such a way as not to cross these highways at grade. But the people wanted the railroad on a level with the highways, so that it might be more accessible from these highways and from adjoining factory sites.

By an Act of the Connecticut Legislature (of which, under Section 1087 of the General Statutes, our Courts are required to take judicial notice), to be found in Vol. IX of the Special Laws, at page 64, it was provided as follows:

> "The locations of the several railroad corporations in this State, of which the New York & New England Railroad Company has become and is a successor, and the construction of said road by and upon its center line, and as adopted and in use by it, are hereby ratified, confirmed, and approved, and the same shall stand good and be for the use and benefit of the said New York & New England Railroad Company."

So matters legally stood when this Act of 1889 was passed.

The most dangerous crossings in the nature of the case are located at centers of population, for there the buildings shut

out the view, and there the travel on the highways is much greater. In many cases (as, indeed, at Bristol) there was open, thinly-settled country about the crossing when the railroad was built. Now, around the railroad station and along the track has sprung up a thriving and populous manufacturing town. On this account the highway at the crossing seems no longer safe enough for those who use it.

In the State of Connecticut the duty of providing and caring for highways is laid upon the towns. In general, the towns are required to keep the highways safe for the increased travel of a growing community. The highways are chiefly for the benefit of the local public and therefore the local municipal corporation is required to keep them safe.

By the law of 1889 the four railroad companies operating railroads in Connecticut are singled out for treatment never accorded to other citizens. The State says to them:

> "Make new highways for the public near your railroad tracks. Move your railroad. Move the highways. Alter the level both of your railroad and the neighboring highways. It will be necessary to acquire land in the very heart of the town. It will be necessary for you to abandon your present layout, which you hold — not in fee, but only for railroad uses, and will therefore lose by this abandonment. It will be necessary to tear down large and substantial buildings. For a change of grade of the highways large damages will be payable to the adjacent landowners. All this will be very expensive. We wish to save the taxes that would be necessary if the public paid for any part of such extensive highway improvements. In all other cases of highway changes we make the owners of adjoining property pay only for special benefits judicially assessed. (Gen. Statutes, Sec. 2706.) But you are railroad corporations, and we propose to get the cost of this expensive engineering work out of you, irrespective of any benefits to you."

Plaintiff claims that in this respect it has been denied the equal protection of the laws to which it is entitled under the Federal Constitution as a citizen of the United States.

It is held by the Supreme Court of Connecticut that a justification of this order of the commissioners is found in the consideration that the railroad company is responsible for its railroad as the town is for the highway, and that it is by the meeting of the two ways at grade that the danger is caused which the State is attempting to remove.

> "Two parties" (the town and the railroad company) "are engaged in legitmate business. . . . Both furnish ways to facilitate public travel. The way of each crosses that of the other at grade, and more or less danger unavoidably attends their use. As the use increases the danger increases. The policy of the State now is to abolish these grade crossings as rapidly as can be reasonably done. Legislation on this subject assumes that each party, in the discharge of its duty, is concerned in creating the danger, and that each may justly be required to contribute to the expense of its removal, etc."
>
> N. Y. & N. E. R. R. Co.'s Appeal from R. R. Commissioners, 58 Conn., 532, 540.

If this were a case where the railroad company were merely required to bear its just share of the expense of removing a source of danger, this reasoning would deserve careful consideration. If the Railroad Commissioners and the Superior Court, after a fair hearing of both the plaintiff railroad company and the defendant town, had ascertained the degree of responsibility of each of the parties and had judicially assessed upon each a corresponding share of the expense, the case then presented would differ widely from that at bar. But, although it is admitted that justice would require the town to pay some, and perhaps a large part, of the expense (see the end of the quotation on page 35 of the Record), nevertheless the town is

favored by an exemption from its just share of the burden, and the other interested party before the commissioners is by the terms of the law required to bear the burden of both. In other words, even in this aspect of the matter, as between it and the town, the railroad company is denied the equal protection of the laws.

II.

Plaintiff claims that by virtue of this law and the order made thereunder, its property is taken without due process of law.

1. AS TO THE TAKING OF PLAINTIFF'S PROPERTY.

The order of the Railroad Commissioners, which stands affirmed by the highest court of the State, requires the plaintiff (Record, p. 9,) to remove its tracks eighty feet to one side of its present location. It follows of course that this cannot be done at the main street of a thickly-settled manufacturing town without destroying brick buildings which now stand on private property where the tracks are to be. The company is furthermore, by the terms of the order, to excavate Main Street, and also *communicating highways* not crossing the railroad (to wit, North Main Street and Prospect Street), so as to make convenient grades for travel on these roads, and is to build over Main Street a double track iron bridge with stone abutments. The order closes as follows:

> "All of said alterations, changes, and removals to be made and done by said railroad company, and the expense thereof, including the damages to any person whose land is taken, and the special damages which the owner of any land adjoining the public highways shall sustain by reason of any change in the grade of such highways in consequence of any change, alteration, or removal above ordered, to be paid by said railroad company."

2. AS TO DUE PROCESS OF LAW.

(*a.*) The Supreme Court of Connecticut justifies this taking of plaintiff's property by the following reasoning:

> "This statute is in its operation an amendment to the charter of each of the railroad corporations affected by it. It imposes on the plaintiff, being a corporation of that kind, an obligation which previous to its passage the charter of the plaintiff did not impose; but as that charter contained the provision that it might be altered at pleasure by the legislature, the statute is binding upon it." (Record, p. 34.)

The scope of this claim seems wider than that of the claim made in support of the attack by the Legislature of New York on the Broadway Surface Railroad Company, yet the New York Court of Appeals held that claim to be contrary to the constitution in People *vs.* O'Brien, 111 N. Y., 1. In that case all that was attempted to be affected was a franchise created by an amendable charter. The Supreme Court of Connecticut holds, that because the charter of a corporation may be amended, there is no limitation on the rights of the legislature over the property of that corporation.

The plaintiff desires at the proper time to argue that the right to amend the charter of a corporation does not include the right to arbitrarily deprive the stockholders of this corporation of what in substance is their property, held by them, it is true, for purposes of management and control, under a corporate organization created by a special law, but being nevertheless private property — not by virtue of any charter, but by force of the most fundamental and general laws of modern society, which from their nature necessarily protect alike and fully all legitimate acquisitions of the members of the community, no matter whether held by them as individuals, or partnerships, or associations, or corporations.

(*b.*) In this connection it should be noted in passing, that the law in question does not by its terms lay a burden on the

corporation which built the railroad, nor on the corporation which owns it, but only on the corporation which operates the railroad, and which does not need any special franchise to do this. It may be mentioned for purposes of illustration that one of the four corporations operating a railroad in Connecticut to which this act applies, is not a corporation of the State at all.

(*c.*) The only other reasons given by the Supreme Court of Connecticut in justification of the taking of plaintiff's property are found on page 35 of the Record, in the form of a quotation from one of its prior decisions. From this reasoning of the Court, it appears that the town and the railroad company — not as wrong doers, but each "in the discharge of its duty — is concerned in creating the danger" which exists upon a highway where it crosses a railroad at grade. "So far as towns are concerned, it is a duty that has ever devolved upon them to keep the highways reasonably safe." "Railroad companies, in some sense, are but agents of the government in affording to the public a more expeditious and vastly improved method of travel" on their own private property.

Therefore, so runs the conclusion, since the legislature has the right to provide and maintain the public highways through the instrumentality of towns, it may also authorize a board of railroad commissioners to compel railroad companies in their capacity of "governmental agents" to made the neighboring public highways safe.

As to this, the plaintiff desires at the proper time to submit argument to the effect that calling a railroad a highway does not make the person or corporation operating the railroad a piece of governmental machinery like the town, and that because a State may lay taxes through the agency of the towns, and so pay for a public service, it does not follow that it may force a private corporation to use up its private property for the same purpose.

(*d.*) In the latter part of this quotation on page 35 of the Record, the Court suggests another idea which may be stated as follows: Grade crossings are, it is true, not really nuisances. Those who maintain them are not liable for so doing, either criminally or civilly. They have been created, not wrongfully, but with the express sanction of law. Still in a certain popular sense they may be called nuisances.

"Therefore," the Court says, "we think it is competent for the State to cause them to be abated and they may require any party responsible for their existence to pay any part or all of the expenses. That being so, requiring the railroad company to pay three-fourths of the expense, however just it might be to require the town to pay more than one-fourth, it is not a matter of which the railroad company can legally complain. The statute may operate harshly, as all statutes are liable to in certain cases, but it is not unconstitutional."

In other words, the Supreme Court of Connecticut justifies the arbitrary subjection of a railroad company to a heavy burden, part of which it admits justly belongs on the town, by applying the principle that there is no contribution between wrong-doers. This is stated as follows in another part of that opinion from which the Court makes the above quotation:

> "If the legislature should require the division of joint property between two persons equally interested in such a manner as to give one three-fourths and the other but one-fourth, it would be indefensible, being against natural right and not due process of law. So, too, of a statute that should attempt to compel one of two joint obligors, jointly and equally interested, to assume the whole obligation as between themselves. But the case before us is not a case in which the legislature is attempting to apportion joint property, or a joint contract obligation between the parties, but is a case of curing an evil where both parties in some measure, but in different degrees, are responsible for the evil. If two jointly commit a tort, whereby another is in

jured, the law will compel either party to pay the whole damage ; and ordinarily no contribution is allowed."

N. Y. & N. E. R. R. Co.'s Appeal from Railroad Commissioners, 58 Conn., 539.

Yet, in the same opinion, the Court admits that the railroad company is not truly a wrong-doer. As they state it, the town and the railroad company are both engaged in "legitimate business." "Both furnish ways to facilitate public travel. The way of each crosses that of the other at grade, and more or less danger unavoidably attends their use. As the use increases the danger increases." In the Town of Westbrook's Appeal, 57 Conn., 104, the Connecticut Supreme Court says, speaking of the Act for the removal of grade crossings :

> "Its object is to change or remove certain conditions, *lawful in themselves*, but which have become a source of danger to life and property."

The plaintiff desires, when this case is finally heard, to argue that a metaphor is not a legal principle, that there is here admittedly no case of a legal nuisance or of a legal wrong of any kind committed by plaintiff, but that the State is dealing in this law and the proceedings of the railroad commissioners thereunder, with crossings which were created in their present form nearly fifty years ago with full legislative authority, and which have received additional legislative sanction, less than fourteen years ago ; and that the State of Connecticut, in applying to the plaintiff, in a case of this kind, rules applicable to joint tort-feasors, covers with only a thin disguise the taking of plaintiff's property without due process of law.

(*e.*) It is suggested that the plaintiff has had a hearing, and that this is enough to constitute due process of law.

As to what has plaintiff been heard ?

The Supreme Court of Connecticut has repeatedly held, even in the decisions against railroad companies above quoted, that the danger at grade crossings is one for which the railroad company cannot in any view be considered solely responsible.

Speaking of the responsibilities of towns to pay for changes required in the removal of railroad grade crossings, in Town of Westbrook's appeal, 57 Conn., 104, the Supreme Court of Connecticut says:

> "The object is to change or remove certain conditions, lawful in themselves, but which have become a source of danger to life and property. The remedy consists in requiring *those charged with the duty of maintaining the highways*, to change the conditions and hereafter discharge their duties in such a manner as to avoid the danger. It is doing no more than has been done for a long time. *Towns* have always been required to keep highways and bridges safe."

In Woodruff *vs.* Catlin, 54 Conn., 295, the questions before the Court related to the crossing of the tracks of two railroad companies by Asylum street in Hartford. The Court held that the city and the two railroad companies, the meeting of whose ways caused the danger, were responsible for it, "in as yet unmeasured and unknown proportions." In that case a tribunal heard the parties fully as to the extent of their several responsibilities and assessed its just share of the expense of removing the grade crossing upon each of the three corporations. This is the sort of hearing plaintiff claims a right to, and this hearing plaintiff has never had.

The railroad commissioners, moreover, selected *ex parte* this one out of the most dangerous crossings on the line of plaintiff's railroad without any consideration of the expense of removing it, compared with that of removing other equally dangerous crossings, and without any consideration of the degree of responsibility of the railroad company for the dan-

gers existing at this particular crossing. In their first order of notice they announced this determination. Plaintiff, under the statute of Connecticut, as now interpreted by the highest court of that State, had no right to be heard as to these matters to it so important.

There was a hearing on the question, how the highway should be carried over or under the railroad. There was also a hearing as to whether plaintiff's financial ability warranted the order. But before the hearings began at all, it was settled by the prejudgment of this extraordinary board of three men, that this particular one among the more dangerous crossings was the one to be removed, and, as a necessary consequence under the law, that no matter how much of the danger at the crossing is created by the condition of the adjoining highways for which the town of Bristol is alone responsible — no matter even, if, on investigation, it could be shown that in this case the railroad company is not responsible for any of the danger at the crossing, nevertheless, the railroad company is to pay for the whole work ordered.

Moreover, it should be noted that the railroad company is not required by this order to merely make reasonable changes in the grade of its railroad. Not only is it ordered to move its railroad tracks over on to ground now occupied by substantial buildings, owned by private persons, and to build a costly bridge, but it is also ordered to go entirely outside of its own location and make safe and comfortable grades not merely on Main street, but on two other compactly-built-up streets, named in the Record at page 9, which do not cross the railroad at all, and is even to pay "the special damages which the owner of any land adjoining the public highways shall sustain by reason of any change in the grade of such highways."

It seems to the plaintiff that, when it is denied a hearing as to all the matters of primary importance, it is a hollow mockery to talk about its having its day in court, because it

is allowed to be heard on a question so narrowed as merely to mean whether it can get money to pay this bill, or because its engineers are allowed to suggest modifications of the plans presented, so as to obviate the ordering of impracticable railroad construction.

III.

In its petition of appeal the plaintiff alleged in paragraphs 2–10 certain notorious facts all going to sustain its claim of law that the commissioners' order appealed from impaired the obligation of its contracts with the holders of its bonds and preferred stock. (See Record, p. 4.)

In the Superior Court the counsel for defendants moved to strike out these allegations. This motion was granted, and plaintiff excepted.

The ruling was that the facts alleged would be admissble in evidence in so far as they might bear on the issue raised under the language of the Connecticut Statutes as to plaintiff's financial ability to pay for the work ordered. Plaintiff was allowed to allege only "that the company is not of sufficient ability to execute the work of making the proposed changes." (Record, p. 17.)

By the statute under which the commissioners acted, they are to order some of the most dangerous crossings removed, "if in their opinion the financial condition of the company will warrant." The Supreme Court of Connecticut has now decided (Record, p. 36) that no question of law can be raised as to the extent of the burdens which a certain amount of financial ability will warrant. The railroad commissioners are held to have jurisdiction to order the removal of the grade crossing — not on condition that the financial condition of the company does in truth warrant the order, but merely on condition that they have an opinion that the company's finan-

cial condition will warrant the order. It follows, of course, that if the Superior Court, on appeal, thinks the company's financial condition will warrant the order, it is only necessary to say so. It is not necessary to make any finding about the company's financial condition, because there is no question to be raised as to what that would really warrant, but only as to what may be the opinion upon that point of the authority issuing the order. The court, so far as this issue raised under the Connecticut Statutes is concerned, did all that was required when it found (Record, p. 20) that the plaintiff is of sufficient ability to execute the order of the railroad commissioners, and that its financial condition is such as to warrant the order.

But the issue raised by plaintiff, under the Constitution of the United States, could not lawfully be thus summarily disposed of. On this issue it is not enough that the court should satisfy itself that there is money enough coming in, as gross earnings, to pay for the work ordered. The question is, whether the appropriation of the very large sum required for this work does not impair the obligation of the contracts made by the company with the holders of its securities under the special sanction of the laws of Connecticut?

The plaintiff claimed to have proved all the facts alleged in paragraphs 2 to 10 struck out by the court, but in accordance with the ruling, striking out these paragraphs, the court would not consider them on the issue raised under the Constitution of the United States, and refused to make any finding with regard to them.

The Superior Court not only refused to find what in fact the financial condition of the plaintiff was proved to be, but refused to take any notice whatever of the issues raised in the above paragraphs. The plaintiff expressly called the attention of the Supreme Court of Connecticut to this error by the following paragraph of its reasons of appeal:

"11. Because the judgment does not meet the issues. There is no general finding of the issues against the plaintiff, and no finding as to issues raised in paragraphs 11 and 17." (Record, p. 29.)

The Supreme Court, in its opinion, affirms the error of the lower court. It has held (Record, p. 37) that "all the material issues in the case were disposed of by the finding and the judgment." It has held that upon the most liberal construction for the plaintiff, the only questions in the case "upon which there could be any issue" were three narrow issues specifically stated. (Record, p. 36.)

So, as appears from the Record, the highest court of the State of Connecticut has overruled plaintiff's claim, that the order passed by the railroad commissioners was void under Article 1, Section 10 of the Constitution of the United States, not by finding that this order does not impair the obligation of contracts, but by quietly omitting this claim of plaintiff, distinctly made by means of paragraphs 2 to 12 of its petition of appeal from among the material issues in the case, on the ground that this "could not" be an issue in the case.

The plaintiff desires at the proper time to argue before this court that the State court erred in refusing to plaintiff the right to make and have considered this issue under the United States Constitution.

BRIEF.

The motion now under consideration raises only the question of the jurisdiction of this Court. It plainly appears on the face of the Record, that in this suit was drawn in question the validity of a law of the State of Connecticut and of an authority exercised thereunder, on the ground that they are repugnant to the Constitution of the United States; that the decision of the highest Court of that State is in favor of the validity of that law and that authority; and that the judgment of the Court below necessarily involves the denial by the State Court of a right and immunity claimed by the plaintiff under the Constitution of the United States.

There is nothing in the brief submitted for defendants to sustain the allegation of the motion to dismiss. That brief is purely an argument on the merits of the cause in support of the motion to affirm.

Counsel for plaintiff does not understand that this Court desires to have its time consumed with motions of this character unless the federal questions involved are really so frivolous as to show that the appeal is not taken in good faith, but is taken simply for delay. He believes that the foregoing brief statement of these questions, or, indeed, a simple inspection of the Record, should be enough to relieve him from the charge of a lack of good faith toward this Court, and should show that he is entitled to be heard in due course.

Moreover, this Court has repeatedly held that, unless the Record shows at least a color of right to a dismissal, it will not consider the motion to affirm.

Whitney *vs.* Cook, 99 U. S., 607.
School District of Ackley *vs.* Hall, 106 U. S., 428.
Hinckley *vs.* Morton, 103 U. S., 764.

Davies *vs.* Corbin, 113 U. S., 687.
New Orleans *vs.* Louisiana Construction Co., 129 U. S., 45.
Amory *vs.* Amory, 91 U. S., 356.

There being in the present instance no possibility of a serious claim that the case is without the jurisdiction of this Court, counsel for plaintiff does not consider it proper to now occupy the attention of the Court with an argument on the merits of the questions involved, nor with a discussion of authorities, but asks the right to be heard on the merits of the cause at the time when the Court under its rules shall afford to the parties an opportunity to be so heard. The following are some of the cases the bearing of which on the case at bar counsel desires to consider in the brief to be then submitted:

Santa Clara County *vs.* So. Pac. R. R., 118 U. S., 394.
Charlotte, Columbia & Augusta Railroad Co. *vs.* Gibbes, 142 U. S. 386, 391.
Yick Wo *vs.* Hopkins, 118 U. S., 356.
Chicago R. R. Co. *vs.* Minnesota, 134 U. S., 418.
Lent *vs.* Tillotson, 140 U. S., 316, 328.
Soon Hing *vs.* Crowley, 113 U. S., 703.
Murdock's Case, 7 Pick., 328.
Murdock *vs.* Phillips Academy, 12 Pick., 262, 265.

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